

9-8-2015

Leytham v. State Clerk's Record Dckt. 43551

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JIMMY D. LEYTHAM,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

Supreme Court Case No. 43551

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE CHERI C. COPSEY

STATE APPELLATE PUBLIC DEFENDER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WASDEN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Jimmy Dale Leytham, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
2/25/2015	MOAF	CCMURPST	Motion & Affidavit for Permission to Proceed on Partial Payment of Court Fees	District Court Clerk
	PETN	CCMURPST	Verified Petition for Post-Conviction Relief	District Court Clerk
	AFFD	CCMURPST	First Affidavit of Petitioner	District Court Clerk
	MOTN	CCMURPST	Motion to Take Judicial Notice of Underlying Criminal Records and Transcripts	District Court Clerk
	MISC	CCMURPST	Waiver of Attorney/ Client Privilege	District Court Clerk
	MOTN	CCMURPST	Motion and Affidavit in Support for Appointment of Counsel	District Court Clerk
	CERT	CCMURPST	Certificate Of Mailing	District Court Clerk
	CHGA	CCMURPST	Judge Change: Administrative	Cheri Copsey (DUI Court)
3/2/2015	CHGA	CCMURPST	Judge Change: Administrative	Cheri C. Copsey
3/4/2015	PROS	PRSMITTJ	Prosecutor assigned Shawna Dunn	Cheri C. Copsey
3/5/2015	MOTN	CCMYERHK	Motion For Scheduling Order	Cheri C. Copsey
3/9/2015	ORDR	CCMASTLW	Order Granting Appointment of Counsel	Cheri C. Copsey
	HRSC	CCMASTLW	Hearing Scheduled (Status Conference 04/15/2015 03:00 PM)	Cheri C. Copsey
3/24/2015	NOAP	TCLAFFSD	Notice Of Appearance (Fuisting for Leytham)	Cheri C. Copsey
	MOTN	TCLAFFSD	Motion To Release PSI	Cheri C. Copsey
	MOTN	TCLAFFSD	Motion For Stay of Proceedings And For Leave To Amend Petition	Cheri C. Copsey
3/26/2015	ORDR	CCMASTLW	Order Releasing PSI	Cheri C. Copsey
4/6/2015	MOTN	CCRADTER	Motion for Waiver of Attorney/Client Privilege	Cheri C. Copsey
4/10/2015	ORDR	CCMASTLW	Order for Waiver of Attorney/Client Privilege	Cheri C. Copsey
4/15/2015	DCHH	CCNELSRF	Hearing result for Status Conference scheduled on 04/15/2015 03:00 PM: District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: 50	Cheri C. Copsey
	HRSC	CCNELSRF	Hearing Scheduled (Review Hearing 05/27/2015 03:00 PM)	Cheri C. Copsey
	STAT	CCMASTLW	STATUS CHANGED: inactive	Cheri C. Copsey
4/22/2015	MISC	CCMASTLW	Transcript Filed	Cheri C. Copsey
5/26/2015	MOTN	CCMYERHK	Motion For Permission To Conduct Deposition Of Counsel, Brian Neville And Brian Blender	Cheri C. Copsey
5/27/2015	DCHH	CCMASTLW	Hearing result for Review Hearing scheduled on 05/27/2015 03:00 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: less than 50	Cheri C. Copsey
5/29/2015	OBJT	CCHOLDKJ	Objection to Depositions	Cheri C. Copsey

Jimmy Dale Leytham, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
6/3/2015	ORDR	DCDANSEL	Order Denying Motion for Discovery	Cheri C. Copsey
6/17/2015	HRSC	CCMASTLW	Hearing Scheduled (Status Conference 06/17/2015 04:00 PM)	Cheri C. Copsey
	DCHH	CCMASTLW	Hearing result for Status Conference scheduled on 06/17/2015 04:00 PM: District Court Hearing Held Court Reporter: Maria Glodowski Number of Transcript Pages for this hearing estimated: less than 50	Cheri C. Copsey
6/30/2015	AFFD	CCSNELNJ	Second and Final Affidavit of Jimmy Leytham in Support of Petition for Post Conviction Relief	Cheri C. Copsey
7/8/2015	ORDR	CCMASTLW	Order Lifting Stay of Proceedings	Cheri C. Copsey
7/27/2015	ANSW	CCGRANTR	Answer to Petition for Post Conviction Relief (Dunn for The State of Idaho)	Cheri C. Copsey
	MOSJ	CCGRANTR	Motion For Summary Dismissal	Cheri C. Copsey
8/24/2015	OBJT	TCLAFFSD	Objection To Motion For Summary Dismissal	Cheri C. Copsey
8/28/2015	ORDR	DCDUMOKA	Order Granting Summary Judgment Dismissal	Cheri C. Copsey
	JDMT	DCDUMOKA	Judgment	Cheri C. Copsey
	CDIS	DCDUMOKA	Civil Disposition entered for: State Of Idaho,, Other Party; Leytham, Jimmy Dale, Subject. Filing date: 8/28/2015	Cheri C. Copsey
	STAT	DCDUMOKA	STATUS CHANGED: Closed	Cheri C. Copsey
9/8/2015	NOTA	CCWRIGRM	NOTICE OF APPEAL	Cheri C. Copsey
9/10/2015	ORDR	CCMASTLW	Order Appointing SAPD	Cheri C. Copsey
10/28/2015	NOTC	TCWEGEKE	Notice of Transcript Lodged - Supreme Court No. 43551	Cheri C. Copsey

FEB 25 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

Jimmy D. Leytham
#16742, ISCI Unit 10
PO Box 14
Boise, ID 83707

Petitioner

CHERI C. COPSEY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY DALE LEYTHAM,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

oOo

Case No.

CV PC 1502841

VERIFIED PETITION FOR
POST-CONVICTION RELIEF

COMES NOW, Jimmy Dale Leytham, Petitioner pro se, in the above-captioned cause, pursuant to Sections 19-4901 - 4911, Idaho Code, presents this Verified Petition for Post-Conviction Relief and alleges as follows:

1. Petitioner is in the custody of the State Board of Corrections, housed at the Idaho State Correctional Institution, Boise, Idaho.
2. The sentencing court which imposed the judgment/sentence was the Fourth Judicial District, County of Ada.
3. The case number and offense for the sentence imposed is:
 - a. Case Number CR-FE-2014-0003478;
 - b. Offense: COUNT II Forgery, Felony, Section 18-3601, Idaho Code.
4. Date of Sentence: December 31, 2014, before the Honorable Cheri C. Copsey, District Judge presiding.

VERIFIED PETITION FOR POST-CONVICTION RELIEF - 1

5A

5. Petitioner plead guilty pursuant to plea negotiations in which he agreed to plead to COUNT II, Forgery, I.C. 18-3601, and Count(s) I and II were dismissed.

6. Other filings: Petitioner filed a timely notice of appeal on the district court's Judgment of Conviction and Commitment Order.

7. Petitioner has requested the appointment of conflict free counsel and has submitted with this filing a Motion and Affidavit for Appointment of Conflict Fee Counsel.

8. Petitioner is seeking waiver of fees and costs in this matter and has submitted a Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees (Prisoner).

9. Petitioner hereby sets forth the following claims for post-conviction relief which are contrary to, or involved an unreasonable application of clearly established Federal and State Law, as determined by the Supreme Court of the United States, and the conviction resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state district court proceedings.

Claim One

Ineffective Assistance of Trial Counsel:

Failure to Conduct Investigation

Petitioners Trial Counsel, Brian P. Neville, was constitutionally ineffective for failing to conduct a proper pre-trial investigation. As a result, this violated Petitioners "right to counsel" and "due process of law" as guaranteed by the 6th and 14th Amendments to the Constitution of the United States, and Art. I, Section

13 of the Constitution of the State of Idaho. See: Strickland v. Washington, 466 U.S. 668 (1984); Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); among others.

Claim Two

Ineffective Assistance of Trial Counsel:

Guilty Plea Ineffectiveness

Petitioners Trial Counsel, Brian P. Neville, was ineffective for failing to make an adequate investigation into his case, and explanation of trial strategy, prior to entering a guilty plea due to Trial Counsel's assurances that he would receive probation by pleading guilty. As a result, this violated Petitioners "right to counsel" and "due process of law", as guaranteed by the 6th and 14th Amendments to the Constitution of the United States, and Art. I, Sec. 13 of the Constitution of the state of Idaho. See: Strickland v. Washington, 466 U.S. 668 (1984); Hill v. Lockhart, 474 U.S. 52 (1985); Tollet v. Henderson, 411 U.S. 258 (1973); Padilla v. Kentucky, 130 S.Ct. 1473 (2010); Laffler v. Cooper, 132 S.Ct. 1376 (2012); Missouri v. Fry, 132 S.Ct. 1399 (2012); Booth v. State, 151 Idaho 612, 617, 262 P.3d 255, 260 (2011); among others.

Claim Three

Ineffective Assistance of Trial Counsel:

Breakdown In Communications Between Defendant and Counsel

Petitioners Trial Counsel, Brian P. Neville, was ineffective for failing to communicate with Petitioner in order to subject the prosecution's case to a meaningful adversary testing process. As a result, this violated Petitioners "right to counsel" and "due process of law", as guaranteed by the 6th and 14th

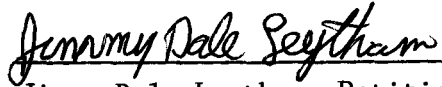
Amendments to the Constitution of the United States, and Art. I, Sec. 13 of the Constitution of the state of Idaho. See: U.S. Cronic, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 668 (1984); Bell v. Cone, 535 U.S. 685 (2002); Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005), among others.

10. Petitioner further supports the above listed Federal Claims with a statment of facts in the "First Affidavit of Petitione" that sets forth the factual basis of his Federal Claims to this state Court and is incorporated herein as if restated in its entirety.

11. Petitioner seeks the following relief:

- a) ORDER respondent to respond to this Verified Petition within 30 days of filing in accordance with Idaho Code Section 19-4906(a);
- b) ORDER an evidentiary hearing to be held on these matters before the state trial court pursuant to Idaho Code Section 19-4907 in order to properly expand the record further;
- c) FIND and DECLARE for Petitioner on his Federal Constitutional Claims presented herein, by addressing with aid of the First Affidavit of Petitioner and Exhibits, underlying criminal records and transcripts; ISSUE ITS WRIT for Post-Conviction Relief VACATING the Judgment of Conviction and Commitment Order for Petitioner would have entered plea negotiations in a completely different posture; and
- d) GRANT any further relief that justice may so permit.

Respectfully submitted this 19 day of Feb, 2015.

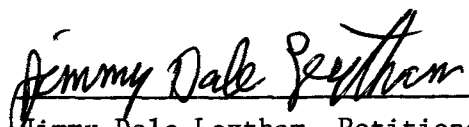

Jimmy Dale Leytham, Petitioner

VERIFICATION

STATE OF IDAHO)
 : ss.
County of Ada

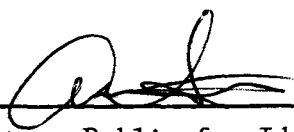
I, JIMMY DALE LEYTHAM, being sworn under oath states follows:

I am the Petitioner in the above-captioned VERIFIED PETITION FOR POST-CONVICTION RELIEF, and have read the contents therein, and that all statements are true and correct to the best of my knowledge and belief.


Jimmy Dale Leytham, Petitioner

SUBSCRIBED, SWORN and AFFIRMED to before me this 29 day of February,
2015.




Notary Public for Idaho
Commission expires: Shupac

CERTIFICATE OF SERVICE

I certify that I placed an original of the foregoing in the Prison Legal Mail System to be filed by the Clerk of the Court and a true and correct copy to be forwarded via U.S. Mail to:

Original to:

Christopher D. Rich, Clerk
Ada County District Court
200 W. Front St.
Boise, ID 83702-7300

Copy to:

Ada County Prosecuting Attorney
200 W. Front St. Rm. 3191
Boise, ID 83702-7300



Jimmy Dale Leytham, Petitioner

2-19-2015
Date

FEB 25 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

Jimmy D. Leytham
Full Name of Party Filing Document
#16742, ISCI Unit 10
Mailing Address (Street or Post Office Box)
PO BOX 14
City, State and Zip Code
Boise, ID 83707
Telephone

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY DALE LEYTHAM,
Petitioner,
vs.
STATE OF IDAHO,
Respondent.

Case No. CV PG 1502841

MOTION AND AFFIDAVIT FOR
PERMISSION TO PROCEED ON PARTIAL
PAYMENT OF COURT FEES (PRISONER)

IMPORTANT NOTICE: Idaho Code § 31-3220A requires that you serve upon counsel for the county sheriff, the department of correction or the private correctional facility, whichever may apply, a copy of this motion and affidavit and any other documents filed in connection with this request. You must file proof of such service with the court when you file this document.

Petitioner asks to start or defend this case on partial payment of court fees, and swears under oath

1. This is an action for (type of case) Post-Conviction Relief Action. I believe I am entitled to get what I am asking for.

2. ☒ I have not previously brought this claim against the same party or a claim based on the same operative facts in any state or federal court. ☐ I have filed this claim against the same party or a claim based on the same operative facts in a state or federal court.

3. I am unable to pay all the court costs now. I have attached to this affidavit a current statement of my inmate account, certified by a custodian of inmate accounts, that reflects the activity of the account over my period of incarceration or for the last twelve (12) months, whichever is less.

SM

4. I understand I will be required to pay an initial partial filing fee in the amount of 20% of the greater of: (a) the average monthly deposits to my inmate account or (b) the average monthly balance in my inmate account for the last six (6) months. I also understand that I must pay the remainder of the filing fee by making monthly payments of 20% of the preceding month's income in my inmate account until the fee is paid in full.

5. I verify that the statements made in this affidavit are true. I understand that a false statement in this affidavit is perjury and I could be sent to prison for an additional fourteen (14) years.

(Do not leave any items blank. If any item does not apply, write "N/A". Attach additional pages if more space is needed for any response.)

IDENTIFICATION AND RESIDENCE:

Name: Jimmy Dale Leytham Other name(s) I have used: _____

Address: #16742, ISCI Unit 10, PO BOX 14, Boise, ID 83707

How long at that address? 60 days Phone: I DO NOT NO

Year and place of birth: 1955 Jerome ID

DEPENDENTS:

I am ☐ single ☒ married. If married, you must provide the following information:

Name of spouse: Joyce A Leytham

460 W Boise ST KUNA ID. 83634

My other dependents including minor children (use only initials and age to identify children) are: _____

NONE

INCOME:

Amount of my income: \$ 384.00 per ☐ week ☒ month wife

I WAS ON Disability Bgt NO MORE

Other than my inmate account I have outside money from: Joyce Leytham
10.00 every 2 weeks

My spouse's income: \$384.00 per ☐ week ☒ month.

ASSETS:

List all real property (land and buildings) owned or being purchased by you.

Your Address	City	State	Legal Description	Value	Equity
460W Boise St	Kanna	ID	83634	\$132.00	none
				2	owe 132.00

List all other property owned by you and state its value.

Description (provide description for each item)	Value
Cash <u>my wife 384.00 month.</u>	
Notes and Receivables <u>NONE</u>	
Vehicles <u>1997 FORD PICKUP 500.00 2006 FORD EXPLORER 1800.00</u>	500.00
Bank/Credit Union/Savings/Checking Accounts <u>CAPITAL ED.</u>	50.00
Stocks/Bonds/Investments/Certificates of Deposit <u>NONE</u>	
Trust Funds <u>NONE</u>	
Retirement Accounts/IRAs/401(k)s <u>NONE</u>	
Cash Value Insurance <u>NONE</u>	
Motorcycles/Boats/RVs/Snowmobiles	900.00
Furniture/Appliances	325.00
Jewelry/Antiques/Collectibles	100.00

Description (provide description for each item)

TVs/Stereos/Computers/Electronics	TV 100.00 stereo 50.00 computer 100.00
Tools/Equipment	HAND TOOLS 200.00
Sporting Goods/Guns	FISH POLES 45.00
Horses/Livestock/Tack	NONE

Other (describe) ~~ATTO~~ ~~INSURANCE~~ ~~GRACE~~

~~385.21 every 6 months~~

EXPENSES: (List all of your monthly expenses.)

Expense

**Average
Monthly Payment**

Rent/House Payment 45 Bank

902.00

Vehicle Payment(s) NONE

Credit Cards (List last four digits of each account number.)

NONE

Loans (name of lender and reason for loan)

NONE

Electricity/Natural Gas ELECTRICITY

162.00 GAS 30.00

Water/Sewer/Trash

85.00

Phone cell 80.00

LANDLINE 60.00

Groceries

125.00 month

Clothing

0

Auto Fuel

85.00

Auto Maintenance

40.00 every 3 months

Cosmetics/Haircuts/Salons

20.00 every 3 months

Entertainment/Books/Magazines

0

Home Insurance

with pay ment

Expense**Average
Monthly Payment**

Auto Insurance Allstate Auto. 305.00 Every 6 months
Life Insurance _____ 140.00
Medical Insurance Hermana Select Life 80.00
Medical Expense Prescription 100.00 month
Other _____

MISCELLANEOUS:

How much can you borrow? \$ none From whom? nobody
When did you file your last income tax return? 2015 Feb Amount of refund: \$ Don't No

PERSONAL REFERENCES: (These persons must be able to verify information provided.)

Name	Address	Phone	Years Known
<u>Jayce Leytham</u>	<u>460W Boise St. Kuna ID.</u>	<u>208-696-9319</u>	<u>32 YEARS</u>
<u>Jimmy Dale Leytham</u>	<u>Jimmy Dale Leytham</u>		
Typed/printed	Signature		

STATE OF IDAHO)
) ss.
County of ADA)

SUBSCRIBED AND SWORN before me on this 19 day of February 2015



[Signature]
Notary Public for Idaho

Residing at _____

Commission expires 12/31/2015

Jimmy D. Leytham
#16742, ISCI Unit 10
PO Box 14
Boise, ID 83707

FEB 25 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY DALE LEYTHAM,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

oOo

Case No. CV PC 1502041
FIRST AFFIDAVIT OF PETITIONER

STATE OF IDAHO)
 : ss.
County of ADA)

JIMMY DALE LEYTHAM, being sworn under oath deposes and states as follows:

1. I am the petitioner in the above-captioned cause, and presents the following to support the Claims I have set forth in my Petition for Post-Conviction Relief that is presently before this Court for its consideration.

2. I am over the age of 18 years of age and competent to offer the following statements.

3. I was told my attorney was from the firm of Bender Law Office, and that my attorneys name was Mr. Brian Nevell.

4. Mr Brian Nevell told me that he needed to recuse Judge Nevell because he was a relative of Brian Nevell. (Father).

5. During the entire time that Brian Nevell was my attorney, I placed more than

SM

twenty, (20), telephone calls to his Office for him. He never returned any of my calls. Not one time.

6. I believe that Mr. Nevell was appointed to my case in February of 2014.

7. I asked Mr. Nevell numerous times to try to get me a binding Rule 11 plea agreement. He stated to me, "Judge Copsy will not allow those".

8. I asked Mr. Nevell to recuse Judge Copsy. He told me, "Why, she is fair". He, (Mr. Nevell), then informed me that he and his family, and Judge Copsy are such good friends that they spend the holidays together with their families.

9. I was scheduled for a Court hearing on September 10th, 2014. I spoke to Mr. Nevell and he told me that he would contact me on the 7th, of September, 2014, to see if I could reschedule the Court date of the 10th.

I asked this to be rescheduled because I had a job out of town and I did not know if I could get back before the Court date.

10. Mr. Nevell never did contact me as to whether or not my Court date was rescheduled.

11. When I returned from out of town, I did make it to my Court date on the 10th, of September, 2014. However, Mr. Nevell did not show up. He forgot about me, and my Court date. A Mr. Brian Bender filled in for Mr. Nevell; but Mr. Bender did not know about my case.

12. My Wife called Mr. Nevell's telephone several times to find out what was going on and what happened to him at the Court date. There was never any type of return call from Mr. Nevell.

13. When I spoke to Mr. Nevell in person, he explained that he had this

"great deal" worked out for me. I explained to Mr. Nevell that I did not want to enter into a guilty plea as I was not guilty.

14. Mr. Nevell informed me, "...hey, do not worry about it, just plead guilty, and they are going to give to you probation".

15. At the time I appeared before the Court, the Court read to me the Guilty plea advisory form. When I was asked if, "...there has been any type of promises to you," Mr. Nevell told me to say that there was no promises. I asked about the probation he had promised, Mr. Nevell told me, "...that is not what the Court is asking about".

16. I informed Mr. Nevell, "sir, I need some time to think about this". Mr. Nevell told me, "Hey, this is a done deal, you are going to get probation, so you have about 15 minutes, just plead guilty and you will get probation".

17. I did as my attorney advised me to do. I entered the plea of guilty. However, when the Court sentenced me, I received a sentence of ten, (10) years. Five years fixed or determinate, followed by five years indeterminate.

18. I do not believe that Mr. Nevell was truthful in this case. He coerced me into a plea of guilty under the promise that I would only receive a term of probation.

19. I do not believe that Mr. Nevell effectively represented me in this case. I believe that he had an interest in not making his family friend, Judge Copsy, made at him for seeking a binding Rule 11 plea agreement.

20. I believe that Mr. Nevell placed his interest before my interests. I was told that I would receive a term of probation. I did not, and I have been harmed by the misrepresentations of Mr. Brian Nevell.

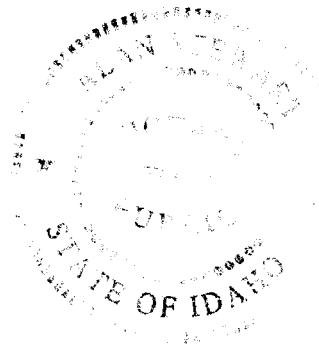
OATH OF AFFIANT

I, Jimmy D. Leytham, do hereby Swear, under the penalty of perjury, as applicable to me under the laws of the State of Idaho, that the information contained in this affidavit are true and correct to the best of my knowledge.

Jimmy D. Leytham
Jimmy D. Leytham, Affiant

2-19-2015
Dated

SUBSCRIBED AND SWORN TO before me this 19 day of February, 2015.



[Signature]
Notary Public in and for the
State of Idaho, Residing at,

My Commission Expires on,
8/16/2020

FEB 25 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

Jimmy D. Leytham
#16742, ISCI Unit 10
PO Box 14
Boise, ID 83707

Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY DALE LEYTHAM,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

oOo

Case No. 2014-0003478

MOTION TO TAKE JUDICIAL NOTICE OF
THE UNDERLYING CRIMINAL RECORDS
AND TRANSCRIPTS

COMES NOW, Jimmy Dale Leytham, Petitioner pro se, in the above-captioned cause, pursuant to Rule 201(d), of the Idaho Rules of Evidence, moves this Court for an Order to take judicial notice of the underlying criminal records and transcripts in the case of State of Idaho v. Jimmy Dale Leytham, Case Number CR-FE-2014-0003478, Ada County, to include but not limited to the following:

1. The entire underlying criminal record;
2. Transcript from the underlying criminal case, to include the guilty plea hearing, and sentencing hearing;
3. The Guilty Plea Advisory Form that was used at the Guilty Plea Hearing;
4. The Presentence Investigation Report;
5. The Clerk's Record and Reporters Transcript which was lodged in the appeal of the Judgment of Conviction and Commitment Order;
6. The Presentence Investigation Report.

MOTION TO TAKE JUDICIAL NOTICE - 1

5A

STANDARD OF REVIEW

A post-conviction relief proceeding is not an extension of the criminal case from which it arises. Rather, it is a separate civil action in which the applicant bears the burden of proof imposed upon a civil plaintiff. Paridis v. State, 110 Idaho 534, 536, 716 P.2d 1306 (Idaho 1986). No part of the record from the criminal case becomes part of the record in the post-conviction proceeding unless it is entered as an exhibit. Exhibits, as well as transcripts of the pre-trial proceedings, the trial, and sentencing hearing in the criminal case, even if previously prepared as a result of a direct appeal or otherwise, are not before the trial court in the post-conviction proceeding and do not become part of the record on appeal unless presented to the trial court as exhibits. Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct.App. 1994); Wolf v. State, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct.App. 2011), or unless the trial court takes judicial notice of such records from the criminal case. Idaho Rules of Evidence 201. Esquivel v. State, 149 Idaho 255, 258, n.3 233 P.3d 186, 189 n.3 (Ct.App. 2010). See also Schultz v. State, 153 Idaho 791, 799 (Ct.App. 2012).

Based upon the foregoing it is requested this Court take judicial notice of the underlying criminal records and transcripts, and those other documents that are identified above as an Exhibit, and grant any further relief justice may so allow.

DATED this 19 day of Feb., 2015.


Jimmy Dale Leytham, Petitioner

VERIFICATION

I, JIMMY DALE LEYTHAM, certify (or declare) under penalty of perjury pursuant to Idaho Code Section 19-1406, that the foregoing is true and correct to the best of my knowledge and belief.

Jimmy Dale Leytham
Jimmy Dale Leytham, Petitioner

2-19-2015
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I submitted an original to the Clerk of the Court for filing and a true and correct copy via the Prison Legal Mail System to be forwarded via the U.S. Mail to:

Original to:

Christopher D. Rich, Clerk
Fourth District Court
200 W. Front St.
Boise, ID 83702-7300

Copy to:

Ada County Prosecuting Attorney
200 W. Front St. Rm. 3191
Boise, ID 83702-7300

Jimmy Dale Leytham
Jimmy Dale Leytham, Petitioner

2-19-2015
Date

FEB 25 2015

Jimmy D. Leytham
#16742, ISCI Unit 10
PO Box 14
Boise, ID 83707

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY DALE LEYTHAM,
Petitioner,

vs.

STATE OF IDAHO,
Respondent.

oOo

Case No. **CV PC 1502841**
Ref: CR-FE-2014-0003487

WAIVER OF ATTORNEY/CLIENT PRIVILEGE

I, JIMMY DALE LEYTHAM, do hereby acknowledge the following:

1. I have submitted to the District Court a Verified Petition for Post-Conviction Relief for its consideration, and have asked for the Court to appoint conflict free counsel to represent me in these matters.

2. I was represented by Brian P. Neville, Attorney at Law, in Ada County Case CR-FE-2014-0003487, in which I plead guilty to the offense of Forgery, a violation of Idaho Code Section 18-3601.

3. The testimony of Mr. Neville regarding CR-FE-2014-0003487 is vital to my Verified Petition for Post-Conviction Relief which is submitted with this Wavier of Attorney/Client Privilege for the Court's consideration.

4. By signing this document, I hereby waive my attorney/client privilege in CR-FE-2014-0003487.

WAIVER OF ATTORNEY/CLIENT PRIVILEGE - 1

SA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I submitted an original of the foregoing to the Clerk of the Court for filing and a true and correct copy via the Prison Legal Mail System to be forwarded via the U.S. Mail to:

Original to:

Christopher D. Rich, Clerk
Ada County District Court
200 W. Front St.
Boise, ID 83702-7300

Copy to:

Ada County Prosecuting Attorney:
200 W. Front St. Rm. 3191
Boise, ID 83702-7300

Jimmy Dale Leytham
Jimmy Dale Leytham, Petitioner

2-19-2015
Date

FEB 25 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

Inmate name Jimmy D. Leytham
IDOC No. 16742, ISCI Unit 10
Address PO Box 14
Boise, ID 83707

Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY DALE LEYTHAM,)
)
) Petitioner,)
)
) vs.)
)
) STATE OF IDAHO,)
)
) Respondent.)
)

CV PC 1502841
Case No. _____

**MOTION AND AFFIDAVIT IN
SUPPORT FOR
APPOINTMENT OF
COUNSEL
(CONFLICT FREE)**

COMES NOW, Jimmy Dale Leytham, Petitioner in the above
entitled matter and moves this Honorable Court to grant Petitioner's Motion for Appointment of
Counsel for the reasons more fully set forth herein and in the Affidavit in Support of Motion for
Appointment of Counsel.

1. Petitioner is currently incarcerated within the Idaho Department of Corrections
under the direct care, custody and control of Warden Keith Yordy,
of the Idaho State Correctional Institution, Boise.

2. The issues to be presented in this case may become to complex for the Petitioner
to properly pursue. Petitioner lacks the knowledge and skill needed to represent him/herself.

3. Petitioner required assistance completing these pleadings, as he/she was unable to
do it him/herself.

MOTION AND AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL - 1
Revised: 10/14/05

SA

4. Petitioner is claiming ineffective assistance of trial counsel and therefore needs conflict free counsel appointed in these matters.

DATED this 19 day of Feb, 2015.

Jimmy Dale Leytham
Petitioner

AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL

STATE OF IDAHO)
) ss
County of ADA)

JIMMY DALE LEYTHAM, Petitioner, after first being duly sworn upon his/her oath, deposes and says as follows:

1. I am the Affiant in the above-entitled case;
2. I am currently residing at the Idaho State Correctional Institution under the care, custody and control of Warden Keith Yordy.
3. I am indigent and do not have any funds to hire private counsel;
4. I am without bank accounts, stocks, bonds, real estate or any other form of real property;
5. I am unable to provide any other form of security;
6. I am untrained in the law;
7. If I am forced to proceed without counsel being appointed I will be unfairly handicapped in competing with trained and competent counsel of the State;

Further your affiant sayeth naught.

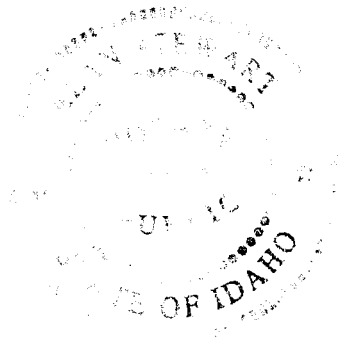
WHEREFORE, Petitioner respectfully prays that this Honorable Court issue
it's Order granting Petitioner's Motion for Appointment of Counsel to represent his/her interest,
or in the alternative grant any such relief to which it may appear the Petitioner is entitled to.

DATED This 19 day of Feb, 20 15.

Jimmy Dale Leytham
Petitioner

SUBSCRIBED AND SWORN AND AFFIRMED to before me this 19 day
of February, 20 15.

(SEAL)



[Signature]
Notary Public for Idaho
Commission expires: 8/10/2017

CERTIFICATE OF SERVICE

I HEREBY certify that I mailed a true and correct copy of the foregoing via
Prison Legal Mail System to be forwarded via U.S. Mail to:

ADA COUNTY PROSECUTOR
200 W. Front St. Rm. 3191
Boise, ID 83702-7300

Jimmy D. Leytham
Jimmy D. Leytham

2-19-2015
Date

FILED
Wednesday, February 25, 2015 at 09:11 AM
CHRISTOPHER D. RICH, CLERK OF THE COURT

BY: 
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Jimmy Dale Leytham,
Plaintiff,

vs.

State of Idaho,
Defendant.

CASE NO. CV-PC-2015-02841

CERTIFICATE OF MAILING

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have
mailed, by United States Mail, one copy of the: **VERIFIED PETITION FOR POST
CONVICTION RELIEF** as notice pursuant to Rule 77 (d) I.R.C.P. to each of the parties or
attorneys of record in this cause in envelopes addressed as follows:

ADA COUNTY PROSECUTING ATTORNEY
(INTERDEPARTMENTAL MAIL)

ADA COUNTY PUBLIC DEFENDER
(COPY IN FILE)

Jimmy D. Leytham # 16742
ISCI Unit 10 PO Box 14
Boise, Idaho 83707

Dated: Wednesday, February 25, 2015
CHRISTOPHER D. RICH
Clerk of the Court

By: 
Deputy Clerk

CERTIFICATE OF MAILING
Court Reference

1/1

2/25/2015

GA

CF-Copsey.
3/9/15 g/h

NO. 10 FILED
A.M. _____ P.M. _____

MAR 05 2015

CHRISTOPHER D. RICH, Clerk
By MAURA OLSON
DEPUTY

JAN M. BENNETTS
Ada County Prosecuting Attorney

Shawna Dunn
Deputy Prosecuting Attorney
ISB No. 5287
200 W. Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY DALE LEYTHAM,)	
)	Case No. CV-PC-2015-02841
Petitioner,)	
)	MOTION FOR SCHEDULING
vs.)	ORDER
)	
THE STATE OF IDAHO,)	
)	
Respondent.)	

COMES NOW, Shawna Dunn, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, in the above entitled matter, and moves this Court for a scheduling order permitting filing of the Answer more than thirty days from the filing of the petition.


The petitioner has moved for post-conviction relief and has requested counsel. In the event that counsel is appointed, the landscape of the post-conviction claims may vary widely from the current petition. Idaho Code 19-4906 provides that the Answer is due within 30 days, "or within any further time the court may fix." The State asks that the Court

82

fix the due date of the Answer after the decision on the defendant's motion for counsel. The State asks for sufficient time from the issuance of the Court's order to provide an Answer.

RESPECTFULLY SUBMITTED this 3rd March day of ~~February~~, 2015.

JAN M. BENNETTS
Ada County Prosecutor

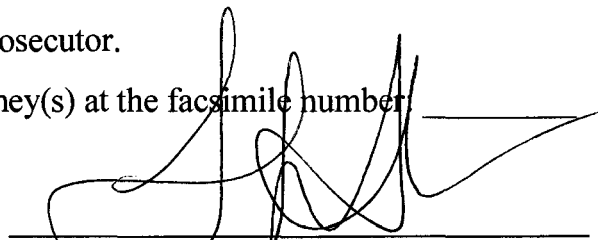

Shawna Dunn
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd March day of ~~February~~, 2015, a true and correct copy of the foregoing State's Motion for Scheduling Order was served to: in the manner noted below:

Jimmy D. Leytham, IDOC No. 16742, ISCI Unit 10, PO Box 14, Boise, Idaho 83707

- ☒ By depositing copies of the same in the United States mail, postage prepaid, first class.
- ☐ By depositing copies of the same in the Interdepartmental Mail.
- ☐ By informing the office of said individual(s) that said copies were available for pickup at the Office of the Ada County Prosecutor.
- ☐ By faxing copies of the same to said attorney(s) at the facsimile number _____


Legal Assistant

MAR 09 2015

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF IDAHO
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHRISTOPHER D. RICH, Clerk
By BETH MASTERS
DEPUTY

JIMMY D. LEYTHAM,

Petitioner,

Case No. CV-PC-2015-02841

vs.

**ORDER
GRANTING APPOINTMENT
OF COUNSEL**

THE STATE OF IDAHO,

Respondent.


On January 2, 2015, in Case No. CR-FE-2014-0003478, the Court imposed an aggregate sentence of ten (10) years with five (5) years fixed followed by five (5) years indeterminate on Count II, Forgery, Felony, I.C. § 18-3601. In CR-FE-2014-0005269, the Court imposed an aggregate sentence of five (5) years with zero (0) years fixed followed by five (5) years indeterminate on Count II, Criminal Possession of a Financial Transaction Card, Felony, I.C. § 18-3125, -3128, to run consecutively to CR-FE-2014-0003478. He was represented by Brian Neville.

Leytham appealed and that appeal is pending. Leythma filed a post-conviction Petition on February 25, 2015, and requested the Court appoint counsel. Based on the documents in the file, pursuant to I.C. § § 19-4904, 19-852,

IT IS HEREBY ORDERED that the Ada County Public Defender is appointed to represent the Defendant in prosecuting the Petition for Post-Conviction Relief. The appointed counsel is to file a Notice of Appearance within 20 days. **The State shall not answer the Petition at this time.** Furthermore, the Court hereby provides the Ada County Public Defender and Ada County Prosecutor's Office copies of the Petition, accompanying memoranda, any transcripts and requests the Public Defender review them to determine if conflict counsel should be appointed. A status conference is scheduled for April 15, 2015, at 3:00 p.m. Counsel for Leytham and for the State shall appear. The Court further orders Leytham has waived his attorney client privilege. The Defendant shall not file any more material *pro se*.

IT IS SO ORDERED.

Dated this 9th day of March 2015.


Cheri C. Copsey, District Judge

1 The undersigned authority hereby certifies that on 16 March 2015 I mailed, by United
2 States Mail, one copy of the **ORDER GRANTING APPOINTMENT OF COUNSEL** as notice
3 pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes
4 addressed as follows:

5 GREG H. BOWER
6 ADA COUNTY PROSECUTING ATTORNEY
7 KAI WITTWER
8 SHAWNA DUNN

9 ADA COUNTY PUBLIC DEFENDERS OFFICE
10 AUGUST CAHILL

11 BRIAN NEVILLE
12 300 W. MYRTLE STREET, STE. 200
13 BOISE, ID 83702

14 JIMMY DALE LEYTHAM
15 #16742
16 I.S.C.I. UNIT 10
17 PO Box 14
18 Boise , ID 83707

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

19 Date: 3-10-15

By Beth Master
Deputy Clerk

NO. 1040A.M. 10

FILED

P.M.

MAR 24 2015

CHRISTOPHER D. RICH, Clerk
By HALEY MYERS
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

JIMMY D. LEYTHAM,

Defendant.

Case No. CV-PC-2015-2841

NOTICE OF APPEARANCE

TO: The state of Idaho, by and through the Ada County Prosecutor, and to this Honorable Court.

YOU, AND EACH OF YOU, are hereby notified that pursuant to the Court's ORDER appointing the Office of the Ada County Public Defender on March 9, 2015, the defendant above-named is now being represented and is appearing in the above-entitled action by and through the Ada County Public Defender—LANCE L. FUISTING, Deputy Public Defender, appearing on behalf of the Ada County Public Defender for the defendant above-named.

DATED, this 23rd day of March 2015.



LANCE L. FUISTING
Attorney for Defendant

82
NOTICE OF APPEARANCE

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 22 day of March 2015, I mailed a true and correct copy of the within instrument to:

SHAWNA DUNN
Deputy Prosecutor, Ada County

by placing said same in the Interdepartmental Mail.



Quincy K. Harris

ADA COUNTY PUBLIC DEFENDER
Attorney for Defendant

Lance Fuisting
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

NO. 1040 FILED
A.M. _____ P.M. _____

MAR 24 2015

CHRISTOPHER D. RICH, Clerk
By HALEY MYERS
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

JIMMY D. LEYTHAM,

Defendant.

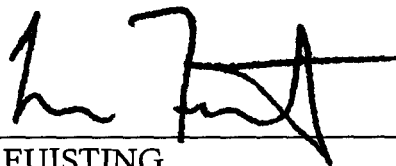
Case No. CR-FE-2014-0003478
CR-FE-2014-0005269
(Civil Case Ref: CV-PC-2015-2841)

MOTION TO RELEASE PSI

COMES NOW, LANCE L. FUISTING of the Ada County Public Defender's Office, court-appointed counsel for JIMMY D. LEYTHAM, and moves this Court, pursuant to Idaho Criminal Rule 32, for an order releasing the presentence investigation report prepared in the above-entitled case number to undersigned counsel.

The defendant recently filed a Petition for Post-Conviction Relief in Case No. CV-PC-2015-2841. Subsequent to petitioner's filing, the Ada County Public Defender's Office was appointed to represent the above-named defendant in post-conviction proceedings. To aid undersigned counsel in the post-conviction proceedings and familiarize counsel with the defendant's case, counsel respectfully requests this Court release a copy of the presentence investigation report generated in the above-entitled case number.

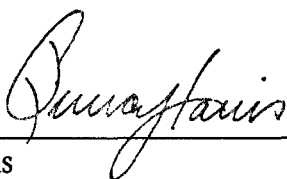
DATED this 23rd day of March 2015.



LANCE L. FUISTING
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of March 2015, I mailed a true and correct copy of the foregoing to SHAWNA DUNN, Ada County Prosecutor's Office, by placing the same in the Interdepartmental Mail.



Quincy K. Harris

Give check card?
3/23/2015
SM

NO. 10 FILED
A.M. 10 P.M.

MAR 24 2015

CHRISTOPHER D. RICH, Clerk
By HALEY MYERS
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorney for Petitioner

Lance Fuisting
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY D. LEYTHAM,

Petitioner,

vs.

STATE OF IDAHO,


Respondent.

Case No. CV-PC-2015-2841

MOTION FOR STAY OF
PROCEEDINGS AND FOR LEAVE
TO AMEND PETITION

COMES NOW the petitioner, JIMMY D. LEYTHAM, by and through his attorney, LANCE FUISTING, Ada County Public Defender's Office, and moves this Court for an order staying proceedings and allowing the petitioner to amend his petition after a discussion of issues with appointed counsel. The petitioner requests a stay of 90 days in order to review the file, receive and review a copy of the presentence investigation report, receive and review transcripts, and prepare an amended petition.

DATED this 23rd day of March 2015.



LANCE L. FUISTING
Attorney for Petitioner

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of March 2015, I mailed a true and correct copy of the foregoing to SHAWNA DUNN, Ada County Prosecutor's Office, by placing the same in the Interdepartmental Mail.



Quincy K. Harris

RECEIVED

MAR 24 2015

Ada County Clerk

ADA COUNTY PUBLIC DEFENDER

Attorney for Defendant

Lance Fuisting

Deputy Public Defender

200 West Front Street, Suite 1107

Boise, Idaho 83702

Telephone: (208) 287-7400

Facsimile: (208) 287-7409

FILED
A.M. P.M. 1.34

MAR 26 2015

CHRISTOPHER D. RICH, Clerk
By BETH MASTERS
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

JIMMY D. LEYTHAM,

Defendant.

Case No. CR-FE-2014-0003478
CR-FE-2014-0005269
(Civil Case Ref: CV-PC-2015-2841)

ORDER RELEASING PSI

This matter having come before the court upon court-appointed counsel's motion, and for good cause appearing, this Court hereby grants counsel's Motion to Release PSI.

A copy of the presentence investigation report prepared on behalf of the defendant in the above-entitled case number shall be made available for review to LANCE L. FUISTING, court-appointed counsel for the defendant in Case No. CV-PC-2015-2841, to aid counsel in preparation of the pending post-conviction proceedings.

Counsel is to make no copies of the report, shall not disclose the report to any other person outside the Ada County Public Defender's Office, and shall surrender said copy to this Court upon completion of the defendant's post-conviction proceedings in Case No. CV-PC-2015-2841. Failure to comply with any portion of Idaho Criminal Rule 32 may be deemed a contempt of court and may be subject to appropriate sanctions.

IT IS SO ORDERED.

DATED this 26th day of March 2015.



CHERI C. COPSEY
District Judge

ORDER RELEASING PSI

APR 06 2015

CHRISTOPHER D. RICH, Clerk
By TENILLE RAD
DEPUTY

JAN M. BENNETTS
Ada County Prosecuting Attorney

Shawna Dunn
Deputy Prosecuting Attorney
200 West Front Street, Room 3191
Boise, Idaho 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY DALE LEYTHAM,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondent.

Case No. CV PC 2015 02841

MOTION FOR WAIVER OF
ATTORNEY/CLIENT
PRIVILEGE

COMES NOW, Shawna Dunn, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and moves this Court for its Order waiving the attorney/client privilege for the following reason:

Petitioner JIMMY DALE LEYTHAM claims, *inter alia*, that his attorney Brian Neville provided ineffective assistance of counsel. The State cannot explore this issue without access to information which is subject to the attorney/client privilege. *See* Evidence Rules 502 and 513. The State therefore asks this Court to find that Petitioner has waived the attorney/client privilege for purposes of these proceedings, as to all

MOTION FOR WAIVER OF ATTORNEY/CLIENT PRIVILEGE (LEYTHAM), Page 1

information held by Brian Neville which is relevant, or which may lead to evidence relevant to Petitioner's claim of ineffective assistance of counsel.

DATED this 6th day of April, 2015.

JAN M. BENNETTS
Ada County Prosecuting Attorney



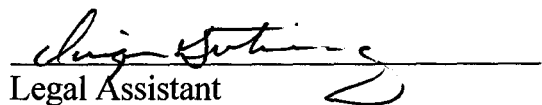
By: Shawna Dunn
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of April, 2015, I caused to be served, a true and correct copy of the foregoing Motion for Waiver of Attorney/Client Privilege upon the individual(s) named below in the manner noted:

Name and address: Lance Fuisting, Ada County Public Defender, 200 W. Front St. Rom 1107, Boise, Idaho 83702

- ☐ By depositing copies of the same in the United States mail, postage prepaid, first class.
- ☒ By depositing copies of the same in the Interdepartmental Mail.
- ☐ By informing the office of said individual(s) that said copies were available for pickup at the Office of the Ada County Prosecutor.
- ☐ By faxing copies of the same to said attorney(s) at the facsimile number: _____



Legal Assistant

RECEIVED
APR 06 2015
Ada County Clerk

JAN M. BENNETTS
Ada County Prosecuting Attorney

Shawna Dunn
Deputy Prosecuting Attorney
200 West Front Street, Room 3191
Boise, Idaho 83702
Telephone: (208) 287-7700

NO. _____ FILED _____
A.M. _____ P.M. 5

APR 10 2015

CHRISTOPHER D. RICH
By BETH MASTERS
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY DALE LEYTHAM,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondent.

Case No. CV-PC-2015-02841

ORDER FOR WAIVER OF
ATTORNEY/CLIENT
PRIVILEGE

The Court having heard the motion heretofore made in the above proceedings of JIMMY DALE LEYTHAM vs. The State of Idaho, by Jan M. Bennetts, Ada County Prosecuting Attorney, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the attorney/client privilege is waived, as to all information held by Brian Neville concerning Petitioner's claim of ineffective assistance of counsel only.

DATED this 10 day of April, 2015.


Cheri C. Copsey
District Judge

Time	Speaker	Note
<u>2:45:25 PM</u>		
<u>2:45:25 PM</u>	Judge	calls LEYTHAM v STATE OF IDAHO CV PC 15 02841 STATUS CONFERENCE Not Transported
<u>2:59:48 PM</u>	counsel	Fuisting/Dunn present, pliff not present
<u>3:00:14 PM</u>	Judge	addresses counsel
<u>3:00:26 PM</u>	State Attorney	addresses court on filings on due dates for responses, Mr. Fuisting will ask for a stay on pc
<u>3:01:15 PM</u>	Judge	reviews files
<u>3:01:29 PM</u>	Defense Attorney	have not file an amended, but asking stay, mtn on the psi, asking stay to file an amended, asking for transcripts, other matter he was sent 12/24/14 can file a Rule 35 motion, ask the court to appoint counsel on criminal
<u>3:02:49 PM</u>	Judge	inquire on pd
<u>3:02:55 PM</u>	State Attorney	no obj to appt
<u>3:03:04 PM</u>	Judge	inquires appl on indigency. y
<u>3:03:17 PM</u>	Defense Attorney	addresses court
<u>3:03:23 PM</u>	Judge	will grant, but he needs to file an affidavit of indigency
<u>3:04:06 PM</u>	Judge	will take count the motion and affidavit for partial payment
<u>3:04:20 PM</u>	Judge	will find indigent to appoint counsel on the underlying criminal case also
<u>3:04:56 PM</u>	State Attorney	no obj to stay, but obj to amended petition
<u>3:05:09 PM</u>	Judge	inquires/
<u>3:05:23 PM</u>	Defense Attorney	response
<u>3:05:38 PM</u>	Judge	will stay on the cv-pc- case, set for status
<u>3:06:24 PM</u>	Judge	inquires on transcripts
<u>3:06:30 PM</u>	Defense Attorney	comments
<u>3:06:35 PM</u>	Judge	Review date 5/27 @ 3 pm another review.

205ey
Bern
hs
5-27-15

NO. 10 FILED
A.M. 10 P.M.

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant

MAY 26 2015

LANCE FUISTING ISB#7791
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

CHRISTOPHER D. RICH, Clerk
By HALEY MYERS
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY D LEYTHAM,

Case No. CV-PC-2015-02841

Petitioner,

vs.

MOTION FOR PERMISSION TO
CONDUCT DEPOSITION OF COUNSEL,
BRIAN NEVILLE AND BRIAN BLENDER

STATE OF IDAHO,

Respondent.

COMES NOW, JIMMY D LEYTHAM, the above-named Petitioner, by and through counsel, LANCE FUISTING, of the Ada County Public Defender's Office, and moves this Court pursuant to Idaho Criminal Rule 57(b), for permission to conduct a deposition of counsel, Mr. Brian Neville and Mr. Brian Blender. In the original Petition for Post-Conviction Relief and accompanying First Affidavit of Petitioner, Petitioner alleges several claims of ineffective assistance of counsel which require further investigation outside the record. In order to protect Petitioners' rights to the effective assistance of counsel and to a full and fair hearing on his claims, this Court should permit him to conduct a deposition of Mr. Neville and Mr. Blender.

A petitioner may employ any method of discovery available under the civil rules, including depositions. I.R.C.P. 26(a). Depositions may extend beyond those conducted of trial counsel and their team, including other important witnesses to the petitioner's claims, such as key law enforcement officers. See, e.g., Rhoades v. State, 135 Idaho

MOTION FOR PERMISSION TO CONDUCT DEPOSITION
OF COUNSEL, BRIAN NEVILLE AND BRIAN BLENDER

299, 302 (2000) (noting post-conviction depositions taken of trial counsel and police officer regarding alleged *Miranda* violation). A transcript from the deposition will be attached to Mr. Leytham's Final Amended Petition for Post-Conviction Relief, pursuant to I.C. § 19-4903 ("Affidavits, records, or other evidence supporting its allegations shall be attached to the application . . ."). After reviewing the deposition, this Court will be in an informed position to decide whether Mr. Leytham's claims should proceed to an evidentiary hearing or be summarily dismissed. I.C. § 19-4906(c) (authorizing summary disposition "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits" that there is no genuine issue of material fact).

A deposition is necessary to provide additional evidentiary support for Mr. Leytham's claims. To prove a claim of ineffective assistance of counsel, Mr. Leytham must show both that his counsels' performance was deficient and that such deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove deficient performance, Mr. Leytham "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To do so, Mr. Leytham must "reconstruct the circumstances of counsel's challenged conduct" for an objective evaluation of counsel's performance at that time. *Id.* at 689. Mr. Leytham "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* Accordingly, a deposition should be granted to afford Mr. Leytham a full and fair opportunity to meet his burden of proof. A complete understanding of the scope of the investigation and preparation of trial counsel is necessary to assess trial counsel's performance. See, e.g., Wiggins v. Smith, 539 U.S. 510, 522-23 (2003)(when assessing trial counsel's choices, courts should first focus on whether the investigation is itself reasonable); *Strickland*, 466 U.S. at 690-91("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

A deposition is the only pre-evidentiary hearing mechanism for fully and fairly developing Petitioner's claims. Unlike affidavits or other discovery methods, depositions provide both parties a full opportunity to reconstruct the circumstances of counsel's

challenged conduct. As noted by the United States District Court for the Southern District of New York:

[D]epositions are preferable if a searching interrogation of the other party is desired. At a deposition the examining party has great flexibility and can frame the questions on the basis of answers to previous questions. Moreover, the party being examined does not have the opportunity to study the questions in advance and to consult with counsel before answering, as is the case if interrogatories are used. Attempts at evasion, which might be stymied by a persistent oral examination, cannot easily be countered by interrogatories. The flexibility and the potency of oral depositions is in large part lacking in written interrogatories.

Madanes v. Madanes, 199 F.R.D. 135, 142 (S.D.N.Y. 2001) (citation omitted); see also Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir.1995) (holding that it is proper under most circumstances to disregard an affidavit when the affidavit is contradicted by the witness's prior deposition testimony).

Recently, the Idaho Supreme Court considered whether a trial court's refusal to permit a post-conviction deposition of trial counsels' investigator constituted an abuse of discretion. *Hall*, 151 Idaho at 52. The Court did not set forth specific criteria for analyzing the propriety of deposing a defense investigator but instead relied upon the three-pronged abuse of discretion standard to determine whether the district court properly denied the deposition of the investigator. *Id.* at 51. The Court noted the investigator was cooperative with post-conviction counsel (although he would not sign an affidavit), and post-conviction counsel were able to depose trial counsel, thus providing petitioner with a means of obtaining evidence to support his claim that counsel were ineffective for failing to investigate and present evidence of an alternate perpetrator. *Id.* at 52. The Court also observed that trial counsels' depositions were the most direct and material evidence of the investigation into the alternate perpetrator they had authorized, the results of that investigation, and how that information was used. *Id.*

All of Mr. Leytham's claims require further investigation in order to determine what factual basis exists for them. Mr. Leytham's present counsel needs to ask questions related to his claims of ineffective assistance in order to provide the required evidence to earn an evidentiary hearing on such claims. Post-Conviction counsel seeks to inquire of Mr. Neville and Mr. Blender as follows:

- I. **Claim One**: Mr. Leytham claims that Mr. Neville failed to conduct a proper pre-trial investigation. Post-Conviction counsel intends to inquire of Mr. Neville regarding his investigation of issues related to Mr. Leytham's case.
- II. **Claim Two**: Mr. Reed claims that Mr. Neville (and Mr. Blender, who covered the Change of Plea hearing) failed to investigate and discuss strategy prior to the entry of a guilty plea. Post-Conviction counsel intends to inquire of both Mr. Neville and Mr. Blender about the facts surrounding the guilty plea and whether there were deficiencies in the representation.
- III. **Claim Three**: Mr. Reed claims that Mr. Neville failed to communicate effectively with him. Post-Conviction Counsel intends to inquire of Mr. Neville about the extent and nature of communications he had with Mr. Leytham.

DATED this 22nd day of May 2015.

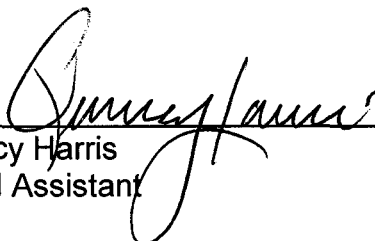


LANCE FUISTING
Attorney for Petitioner

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22 day of May 2015, I mailed (served) a true and correct copy of the within instrument to:

Shawna Dunn
Ada County Prosecutor's Office
Interdepartmental Mail



Quincy Harris
Legal Assistant

**MOTION FOR PERMISSION TO CONDUCT DEPOSITION
OF COUNSEL, BRIAN NEVILLE AND BRIAN BLENDER**

Time	Speaker	Note
<u>2:56:42 PM</u>		LEYTHAM v STATE OF IDAHO CV PC 15 02841 REVIEW
<u>3:19:52 PM</u>		Present: Lance Fuisting for petitioner, Shawna Dunn for respondent
<u>3:20:08 PM</u>	Court	Petitioner has filed a motion for permission to conduct deposition of trial counsel.
<u>3:20:57 PM</u>	Fuisting	That motion was only just filed yesterday. Updates Court on case status since last hearing. Ask that the motion be set for hearing.
<u>3:23:08 PM</u>	Dunn	I'll be filing my Response today or tomorrow.
<u>3:23:39 PM</u>	Court	6/17/15 @ 4pm for hearing on the motion.
<u>3:24:36 PM</u>		End of case

1/25/15
P. 1-15

MAY 29 2015

CHRISTOPHER D. RICH, Clerk
By KATRINA HOLDEN
DEPUTY

JAN M. BENNETTS
Ada County Prosecuting Attorney

Shawna Dunn
Deputy Prosecuting Attorney
ISB No. 5287
200 W. Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY DALE LEYTHAM,)	
)	Case No. CV-PC-2015-02841
Petitioner,)	
)	OBJECTION TO DEPOSITIONS
vs.)	
)	
THE STATE OF IDAHO,)	
)	
Respondent.)	

COMES NOW, Shawna Dunn, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, in the above entitled matter, and object to the petitioner's request to hold depositions in this case.

LEGAL STANDARD

The Supreme Court recently spoke to the issue of post-conviction discovery, saying:

A district court has discretion to grant discovery in post-conviction proceedings. I.C.R. 57(b); *Hall v. State*, 151 Idaho 42, 45, 253 P.3d 716, 719 (2011). However, discovery is required when a petitioner demonstrates it is necessary to protect his substantial rights. *Hall*, 151 Idaho at 45, 253 P.3d at 719. The petitioner "must identify the specific subject matter where discovery is requested and why discovery as to those matters is necessary to his or her application." *Id.* (quoting *State v.*

24

LePage, 138 Idaho 803, 810, 69 P.3d 1064, 1071 (Ct. App. 2003)). While reasonable discovery may be permitted, the district court should not allow the petitioner to engage in a "[f]ishing expedition." *Murphy v. State*, 143 Idaho 139, 148, 139 P.3d 741, 750 (Ct. App. 2006). "The UPCPA provides a forum for known grievances, not an opportunity to research for grievances." *Id.*

State v. Abdullah, 2015 Ida. LEXIS 78, *244-245 (Idaho Mar. 2, 2015).

ANALYSIS

As explained in the *Abdullah* decision, for discovery to be required, the petitioner must show that it is necessary to protect substantial rights. *Id.* The State submits that the petitioner cannot make such a showing. The presentence report along with transcripts of the plea hearing and sentencing hearing defeat the petitioner arguments without the need for depositions or an evidentiary hearing

First, the petitioner claims that the deposition would include inquiry into whether Mr. Neville conducted proper pretrial investigation. There is no specificity to the allegation that more investigation should have been done. The petitioner has not alleged what such investigation would have revealed or why that revelation would have been helpful in the case. The plea hearing transcript clearly reflects that this area was the subject of close scrutiny by the Court. Specifically, the Court inquired,

Q: Have you reviewed the evidence that was provided to your attorney provided [sic] during discovery?

A: Yes, I have.

Q: Is there anything that your attorney has – that you've asked your attorney to do that he has not done?

A: No, ma'am.

Q: And have you told your attorney everything that you know about these crimes?

A: Yes, ma'am

Q: Have you had enough time to talk to your attorney?

A: Yes, ma'am.

Q: Are there witnesses who can demonstrate you are innocent of this crime?

A: No, ma'am.

(Tr., pg. 24, ln.17 to pg. 25, ln.14.)

This passage, along with the rest of the record, reflects that additional inquiry by defense counsel would have been to no avail. Mr. Leytham agreed he had seen the discovery. Mr. Leytham admitted, during his entry of plea, there was nothing he had asked of counsel that had not been done and further admitted there were no witnesses who could demonstrate his innocence. (Tr., pg. 24, ln.17 to pg. 25, ln.14.). More importantly, he also admitted the he had committed the crimes of Forgery and Criminal Possession of a Financial Transaction Card and entered guilty pleas to the same. (Tr., pg. 30, ln.11 to pg. 32, ln. 6.) The State's discovery is in the presentence report and is lengthy. Additionally, the purse theft was on video, which was provided to Mr. Leytham and his attorney in discovery. (Tr., pg. 42, ln.17 – pg. 43, ln.2.) Similarly, there were still photos of Mr. Leytham as he tried to access cash with the victim's card. (Tr., pg. 58, ln.22 to pg. 59, ln. 1) Given all of the above, there has not been a sufficient showing that a deposition in this area would even be productive, let alone necessary.

Next, the petitioner claims that counsel was ineffective in regard to advising him to enter a guilty plea. Counsel Insofar as the evidence against Mr. Leytham was significant on each count, it was not ineffective to advise the petitioner to enter a plea pursuant to a negotiated plea agreement. Advising a client to enter a guilty plea is a tactical decision. The petitioner has not shown counsel's choice of tactics was "was unsound or that it resulted from any shortcomings in counsel's knowledge or preparation." *Huck v. State*, 124 Idaho 155, 160, 857 P.2d 634, 639 (Ct. App. 1993) Further the petitioner has not forwarded any reason to believe depositions would reveal helpful information in this area.

Specifically, the petitioner alleges that counsel failed to adequately advise him of trial strategy. Where the petitioner entered a guilty plea prior to trial, the State cannot perceive how failing to advise of *trial* strategy could be deemed ineffective assistance of counsel. Mr Leytham was guilty as charged and admitted the conduct short of trial. Counsel made a tactical decision to pursue a negotiated plea, based on a thorough understanding of the facts and after consultation with his client.

The petitioner further claims that he was assured he would get probation. This is belied by the record. The petitioner was present when the Court inquired of the State whether the State was

free to argue for imposition, saying, “you can argue for imposition[?]” (Tr., pg. 6, lns. 13-15.) To which the State replied, “Yes, Your Honor.” (Tr., pg. 6, lns. 15.) The Court went to clarify that the plea was not binding. The following exchange then occurred:

Q: What that means is that I can actually give you a 14-year prison sentence in the forgery case and a five-year prison sentence in the financial transaction card case and I can run them consecutive to each other for a total of 19 years without the possibility of parole. Do you understand that?

A: Yes, ma'am.

Q: And I'm not required to follow recommendations of either counsel. Do you understand that?

A: Yes ma'am.

(Tr., pg. 23, lns. 3-14.)

Further even if counsel had not made this clear, the State submits that such a failure could be corrected on the record. Recent appellate court cases in this regard are significant: *Murray v. State*, 156 Idaho 159, 321 P.3d 709 (2014) and *Grant v. State*, ___ Idaho ___, 329 P.3d 380 (Ct. App. 2014). These cases, together, indicate that ineffective assistance of counsel, in the form of inadequate information prior to a guilty plea, can be cured when the criminal defendant is fully advised by the Court. Here, Mr. Leytham's exchange with the Court cures any argument that he was not fully advised by counsel. Moreover, when asked by the Court he indicates that he *does* understand the limitations of the deal – which demonstrates that he had already been informed by counsel.

Finally, the petitioner claims that there was a breakdown of attorney-client communications. The Ninth Circuit has said that, “[t]he Supreme Court has held that a criminal defendant has a constitutional right to counsel who is free of conflicts of interest. It also has held that a defendant does not have a constitutional right to an appointed lawyer with whom he has a ‘meaningful relationship’ so long as the lawyer acts as the client’s advocate.” *Plumlee v. Masto*, 512 F.3d 1211 (9th Cir. 2008). The Ninth Circuit has recently addressed the same issue, saying:

Obviously, the word “conflict” is also used in common parlance to describe a personality conflict, an artistic conflict, a family conflict and many others sorts of antagonism – even war. In this context, however, as the Supreme Court cases make clear, we are talking about legal conflicts of interest – an incompatibility between the interests of the two of a lawyer’s clients, or between the lawyer’s own private interest and those of his client.

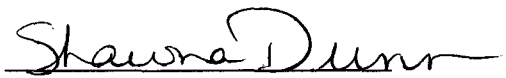
Plumlee v. Masto, 512 F.3d 1204, 1210 (9th Cir. 2008) No actual conflict of interest existed in this case and the “quality” of petitioner’s relationship with his counsel does not rise to the level of meriting a remedy or further inquiry. At this point, he has, at most, claimed that Mr. Neville had a positive social relationship with the trial Judge.¹ Even if true, this would have been to the petitioner’s benefit. Accordingly, further inquiry in this area is not merited. Counsel continued to serve Mr. Leytham’s interests and argued on his behalf at sentencing. There has been no showing that further inquiry is necessary to protect Mr. Leytham’s substantial rights.

CONCLUSION

Based on the foregoing, the State moves that the Court deny the motion for depositions. Further, if the Court is not inclined to grant the State’s motion, the State seeks oral argument.

RESPECTFULLY SUBMITTED this 28 day of May, 2015.

JAN M. BENNETTS
Ada County Prosecutor


Shawna Dunn
Deputy Prosecuting Attorney


¹ The State does not concede the accuracy of this point, but will treat it as true merely for the purposes of our briefing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of May, 2015, a true and correct copy of the foregoing Objection to Depositions was served to: in the manner noted below:

Jimmy D. Leytham, IDOC No. 16742, ISCI Unit 10, PO Box 14, Boise, Idaho 83707

- ☐ By depositing copies of the same in the United States mail, postage prepaid, first class.
- ☐ By depositing copies of the same in the Interdepartmental Mail.
- ☐ By informing the office of said individual(s) that said copies were available for pickup at the Office of the Ada County Prosecutor.
- ☐ By faxing copies of the same to said attorney(s) at the facsimile number: _____



Legal Assistant

JUN 03 2015

CHRISTOPHER D. RICH, Clerk
By LUCILLE DANSEREAU
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY D. LEYTHAM,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondent.

Case No. CV-PC-2015-02841

**ORDER DENYING MOTION FOR
DISCOVERY**

On February 25, 2015, Jimmy Leytham, filed a Petition *pro se*¹ and requested the Court appoint counsel. The Court granted his request that same date. The Court held a status conference, and at the petitioner's request, continued the status conference to allow him to file a Rule 35. At the continued hearing, his counsel requested more time and the Court rescheduled the status conference again to June 17, 2015.

Leytham moved for discovery, more specifically allowing him to take depositions of his trial counsel.

Based on the following, the Court denies his motion.

ANALYSIS

The Idaho Rules of Civil Procedure generally apply to proceedings on an application for post-conviction relief, the discovery provisions contained in those rules are *not* applicable unless specifically ordered by the court. I.C.R. 57(b); *State v. LePage*, 138 Idaho 803, 810, 69 P.3d 1064, 1071 (Ct. App. 2003) (citing *Aeschliman v. State*, 132 Idaho 397, 402, 973 P.2d 749, 754 (Ct. App. 1999)). I.C.R. 57(b) provides as follows:

¹ "Pro se litigants are held to the same standards and rules as those represented by an attorney." *Twin Falls Cnty. v. Coates*, 139 Idaho 442, 445, 80 P.3d 1043, 1046 (2003). Pro se litigants are not accorded any special consideration simply because they are representing themselves and are not excused from adhering to procedural rules. *Nelson v. Nelson*, 144 Idaho 710, 170 P.3d 375, 383 (2007); *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997); *Golay v. Loomis*, 118 Idaho 387, 392, 797 P.2d 95, 100 (1990), quoting *Golden Condor, Inc. v. Bell*, 112 Idaho 1086, 1089 n.5, 739 P.2d 385, 388 n.5 (1987).

ORDER DENYING MOTION FOR DISCOVERY
CASE NO. CV-PC-2015-2841

1 (b) Filing and Processing. The petition for post-conviction relief shall be
2 filed by the clerk of the court as a separate civil case and be processed under the
3 Idaho Rules of Civil Procedure except as otherwise ordered by the trial court;
4 provided the provisions for discovery in the Idaho Rules of Civil Procedure shall
5 not apply to the proceedings unless and only to the extent ordered by the trial court.

6 I.C.R. 57(b) (emphasis added).

7 Discovery during post-conviction relief proceedings is a matter put to the sound discretion
8 of the district court. *Aeschliman*, 132 Idaho at 402, 973 P.2d at 754. Unless necessary to protect
9 Leytham's substantial rights, the Court is not required to order discovery. *Id.* In order to be granted
10 discovery, a post-conviction applicant must identify the specific subject matter where discovery is
11 requested and why discovery as to those matters is necessary to his application. *See Id.* at 402-03,
12 973 P.2d at 754-55. In this request, Leytham is really engaging in nothing but a fishing expedition.
13 While he cites to *Hall v. State*, 151 Idaho 42, 52, 253 P.3d 716, 726 (2011), that was a capital case
14 and does not really apply. In addition, the Supreme Court upheld the District Court's exercise of
15 discretion in denying some additional depositions of investigators.

16 In this Petition, he contends as follows:

- 17 • His attorneys were ineffective for:
 - 18 ○ Failing to investigate
 - 19 ○ Failing to effectively communicate

20 These are routine matters. Other than cursory claims that he wants to inquire regarding
21 investigation of his issues, the Court finds Leytham made no showing why the discovery he
22 requests is necessary to his application. Leytham's claims are abstract. *Raudebaugh v. State*, 135
23 Idaho 602, 605, 21 P.3d 924, 927 (2001). Therefore, in an exercise of discretion, the Court denies
24 motion.

25 **IT IS SO ORDERED.**

26 Dated this 6th day of June 2015.

Cheri C. Copsey
Cheri C. Copsey, District Judge

1
2
3 CERTIFICATE OF MAILING

4 The undersigned authority hereby certifies that on June 3, 2015, I mailed (served) a true
5 and correct copy of the **ORDER DENYING MOTION** as notice pursuant to Rule 77(d) I.C.R. to
6 each of the parties below as follows:

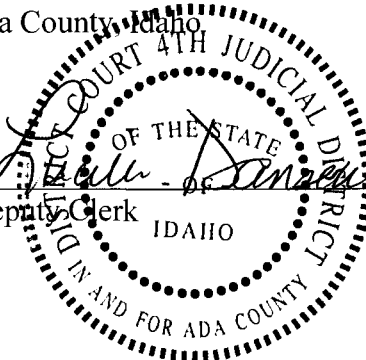
7 ADA COUNTY PROSECUTOR'S OFFICE
8 SHAWNA DUNN
9 INTERDEPARTMENTAL MAIL

10 ADA COUNTY PUBLIC DEFENDERS OFFICE
11 LANCE FUISTING
12 INTERDEPARTMENTAL MAIL

13 CHRISTOPHER D. RICH
14 Clerk of the District Court
15 Ada County, Idaho

16 Date: 6/3/15

17 By [Signature]
18 Deputy Clerk
19 IDAHO
20
21
22
23
24
25
26



Time	Speaker	Note
<u>4:08:56 PM</u>		JIMMY LEYTHAM CV PC 15 02841 STATUS
<u>4:09:01 PM</u>		Present: Lance Fusiting for petitioner, Shawna Dunn for respondent
<u>4:09:22 PM</u>	Dunn	We can lift the stay now.
<u>4:09:30 PM</u>	Fuisting	That's correct. And I'd ask for two weeks from today to file a final Amended Petition.
<u>4:09:48 PM</u>	Court	Ask State to provide the order lifting stay. Amended Petition, or notice of not filing one, due by 7/2; State's response by 8/2/15. Doesn't sound like we'll need an evidentiary hearing.
<u>4:10:49 PM</u>	Fuisting	I'll be seeking one.
<u>4:10:56 PM</u>	Court	I've looked at the claims and they're fairly straight forward.
<u>4:12:18 PM</u>	Court	You have until 8/24/15 to file an opposition; if none is filed, then I'll take the matter under advisement.
<u>4:13:18 PM</u>		End of case

CV-PC-2015-2841
7-1-15

NO. _____ FILED _____
A.M. _____ P.M. 334

JUN 30 2015

CHRISTOPHER D. RICH, Clerk
By TENILLE GRANT
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant

LANCE L. FUISTING, ISB #7791
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY D. LEYTHAM,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-PC-2015-2841

SECOND AND FINAL AFFIDAVIT OF
JIMMY LEYTHAM IN SUPPORT OF
PETITION FOR POST CONVICTION
RELIEF

I, Jimmy D. Leytham, after first being duly sworn (affirmed), do hereby attest to the following:

- 1) I am over the age of eighteen years.
- 2) I was the Defendant in CR-FE-2014-3478 and CR-FE-2014-5259.
- 3) I retained Brian Neville as my attorney in those cases.
- 4) On the day I plead guilty, September 10, 2014, Brian Blender, who works with Mr. Neville, appeared to represent me.
- 5) I did not know Mr. Blender would be appearing prior to September 10, 2014.
- 6) I only had a 7 to 10 minute discussion with Mr. Blender prior to pleading guilty on September 10, 2014.

SECOND AND FINAL AFFIDAVIT OF JIMMY LEYTHAM IN SUPPORT
OF PETITION FOR POST CONVICTION RELIEF

Wg

- 7) Mr. Blender and I did not discuss restitution on September 10, 2014.
- 8) I was taking numerous medications at the time of my change of plea.
- 9) I believe the medications I was taking on September 10, 2014, impacted my ability to understand the proceedings.
- 10) I initially informed the Court that the drugs I was on made me more susceptible to suggestions from Mr. Blender during my change of plea on September 10, 2014.
- 11) I did not fill out the entire written guilty plea myself.
- 12) I told Mr. Neville about my medical conditions.
- 13) Mr. Neville did not attempt to obtain my medical records.
- 14) There was no proof of my medical conditions to supply to the Court at the time of my sentencing.
- 15) Neither Mr. Neville or Mr. Blender explained to me that I had a right not to participate in the presentence investigation process.
- 16) There was no discussion of the restitution amount during my change of plea hearing.
- 17) At sentencing, my attorney agreed to \$55,331.92 in restitution for uncharged conduct on my behalf. I was never asked if I agreed to that amount.
- 18) I believed the restitution was \$202.75. That was the amount in the presentence report.
- 19) My attorney did not show me the presentence report until the day of sentencing.
- 20) My attorney only showed me Dr. Arnold's evaluation on the day of sentencing.
- 21) I was unable to read the presentence report and evaluation myself because of a medical condition.
- 22) I do not believe my attorney read me Dr. Arnold's evaluation in its entirety.
- 23) I do not believe my attorney thoroughly reviewed the presentence report and evaluations with me.
- 24) My attorney only read the recommendations section of the presentence report to me.
- 25) I was advised not to say anything when I had my opportunity to address the Court at sentencing.
- 26) Neither Mr. Neville nor Mr. Blender spoke to me about my right to appeal my sentence.

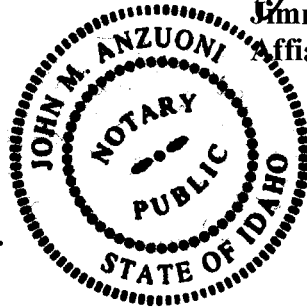
27) No appeal of my sentence was filed.

28) Further your affiant sayeth naught.

DATED, this 30 day of June 2015.

Jimmy D. Leytham
Jimmy D. Leytham

Affiant



STATE OF IDAHO)
)ss.
County of Ada)

SUBSCRIBED and SWORN (AFFIRMED) to before me, a Notary Public, in and for the state of Idaho, county of Ada, this 30th day of June 2015.

John M. Anzuoni

Notary Public

Residing at Ada County

My Commission Expires 8/2016

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 30 day of June 2015, I mailed (served) a true and correct copy of the within instrument to:

Shawna Dunn
Ada County Prosecuting Attorney

Quincy Harris

Quincy Harris

NO. 3.50
A.M. P.M.

JUL 08 2015

CHRISTOPHER D. RICH, CIO
By **BETH MASTERS**
DEPUTY

JIMMY DALE LEYTHAM,)
)
 Petitioner,) **Case No. CV-PC-2015-02841**
)
 vs.) **ORDER LIFTING STAY OF**
) **PROCEEDINGS**
)
 THE STATE OF IDAHO,)
)
 Respondent.)

IT IS HEREBY ORDERED AND THIS COURT DOES ORDER that Order Granting Stay of Proceedings is lifted. The Petitioner is to file any amended petition on or before July 2, 2015.

DATED this 8 day of July, 2015.

Cheri C. Copsey
Cheri C. Copsey
District Judge

NO. _____
A.M. _____ FILED _____ P.M. 768

JUL 27 2015

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

JAN M. BENNETTS
Ada County Prosecuting Attorney

Shawna Dunn
Deputy Prosecuting Attorney
Idaho State Bar No. 5287
200 West Front Street, Room 3191
Boise, Idaho 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY DALE LEYTHAM,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondent.

Case No. CV PC 2015 02841

**ANSWER TO PETITION FOR
POST CONVICTION RELIEF**

COMES NOW, Shawna Dunn, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and does hereby Answer Petitioner's Petition for Post-Conviction Relief in the above-entitled action as follows:

I.

GENERAL RESPONSES TO PETITIONER'S POST-CONVICTION ALLEGATIONS

All allegations made by the Petitioner are denied by the State unless specifically admitted herein.

II.

SPECIFIC ANSWERS TO PETITIONER'S POST-CONVICTION ALLEGATIONS

1. Answering paragraphs 1 and 2 of Petitioner's Petition for Post-Conviction Relief filed February 25, 2015 as CV PC 2015 02841, Respondent admits the allegations contained therein.

2. Answering paragraph 3, the Respondent admits in part and denies in part. The Petitioner was sentenced on case CR-FE-2014-0003478 as the Petitioner alleges. However, the Petitioner was also sentenced in CR-FE-2014-0005269

3. Answering paragraph 4, Respondent admits the allegations contained therein.

4. Answering paragraph 5, the Respondent admits in part and denies in part. As alleged in paragraph 5, the Petitioner entered a guilty plea to Count II. However it was Counts I and III that were dismissed, not I and II as the Petitioner alleges.

5. Answering paragraph 6, the Respondent has insufficient information to either admit or deny that a timely appeal was filed because the Ada County Prosecutor's Office does not generally handle appellate matters for the State. However, the State would note that the only appeal on the register of actions currently is an appeal from the denial of a Rule 35. If there was a timely appeal, from the judgement of conviction it is not recorded on the register of actions reviewed by the Respondent.

6. Answering paragraphs 7 and 8 regarding, the Petitioner's statement of his requests these are not factual allegations capable of being admitted or denied.

7. Answering paragraph 9, the Respondent denies that representation by counsel in this case was ineffective and further denies that any prejudice attached from any alleged ineffectiveness.

5. Answering paragraph 10 and 11 are not factual allegations capable of being admitted or denied

FIRST AFFIRMATIVE DEFENSE

Petitioner's petition fails to state any grounds upon which relief can be granted. Idaho Code § 19-4901(a); I.R.C.P. 12(b)(6).

SECOND AFFIRMATIVE DEFENSE

To the extent Petitioner's claims should have been raised on direct appeal, the claims are procedurally defaulted. Idaho Code § 19-4901(b).

THIRD AFFIRMATIVE DEFENSE


Petitioner's Petition for Post-Conviction Relief contains bare and conclusory allegations unsubstantiated by affidavits, records, or other admissible evidence, and therefore fails to raise a genuine issue of material fact. Idaho Code §§ 19-4902(a), 19-4903, and 19-4906.

WHEREFORE, Respondent prays for relief as follows:

- a) That the Petitioner's claims for post-conviction relief be denied;
- b) That the Petitioner's claims for post-conviction relief be dismissed;
- c) for such other and further relief as the court deems necessary in the case.

DATED this 27th day of July 2015.

JAN M. BENNETTS
Ada County Prosecuting Attorney


By: Shawna Dunn
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 27 day of July 2015, I caused to be served, a true and correct copy of the foregoing Answer to Petition for Post Conviction Relief upon the individuals named below in the manner noted:

Name and address: Lance Fuisting, Ada County Public Defender, 200 W. Front St. Room 1107, Boise, Idaho 83702

- ☐ By depositing copies of the same in the United States mail, postage prepaid, first class.
- ☒ By depositing copies of the same in the Interdepartmental Mail.
- ☐ By informing the office of said individual(s) that said copies were available for pickup at the office of the Ada County Prosecutor.
- ☐ By faxing copies of the same to said attorney(s) at the facsimile number: _____.



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7-28-15

NO. _____
A.M. _____ FILED PM 208

JUL 27 2015

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

JAN M. BENNETTS
Ada County Prosecuting Attorney

Shawna Dunn
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Boise, Idaho 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY DALE LEYTHAM,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondent.

Case No. CV PC 2015 02841

**MOTION FOR SUMMARY
DISMISSAL**

COMES NOW, Shawna Dunn, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and does hereby moves for summary dismissal of the Petitioner's Petition for Post-Conviction Relief pursuant to I.C. §19-4906(c) on the general basis that, in light of the pleadings, answers, admissions, and the record of the underlying criminal case, the petition fails to raise a genuine issue of material fact.

I. STANDARD OF REVIEW

The post-conviction relief process initiates a civil proceeding where, like all civil actions, the petitioner must prove the allegations by a preponderance of the evidence. Murray v. State, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992); I.C. §19-4907. However, unlike ordinary civil actions, an application for post-conviction relief:

must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for

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post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. §19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Knutsen v. State, 144 Idaho 433, 437-38, 163 P.3d 222, 226-27 (Ct. App. 2007). If a petitioner cannot support allegations in his post-conviction petition with verified facts or admissible evidence,

Idaho Code §19-4906 authorizes summary disposition of an application for post conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. (citation omitted)

Goodwin v. State, 138 Idaho 269, 271-72, 61 P.3d 626, 627 (Ct. App. 2002). Further, the Court of Appeals explained that:

Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. *Citations omitted*.

Keserovic v. State, 345 P.3d 1024, 1028-29 (Ct. App. 2015). The Idaho Supreme Court specified in State v. Lovelace that Courts “do not give evidentiary value to mere conclusory allegations that are unsupported by admissible evidence.” State v. Lovelace, 140 Idaho 53, 61, 90 P.3d 278, 286 (2003).

II. ISSUES

In the Petitioner's petition, he identifies three claims for relief based on allegations of ineffective assistance of counsel. The Court should dismiss the claims for post-conviction relief because the Petitioner failed to present sufficient evidence to raise a genuine issue of material fact as to whether his representation was ineffective. Evidence demonstrates that:

1. Petitioner's counsel fulfilled his duty to investigate;
2. Petitioner's counsel adequately advised him on all matters necessary to enter an informed guilty plea;
3. The quality of petitioner's relationship with his counsel does not rise to the level of meriting a remedy;

To the extent that additional facts raised in the Petitioner's Second Affidavit could be construed as additional claims for relief, those possible claims are without merit because:

4. Petitioner was informed of his rights and responsibilities under the plea deal prior to entry of plea.
5. None of the Petitioner's medications impaired his ability to enter an informed guilty plea.

III. ANALYSIS

The Court should grant the State's Motion for Summary Judgment as the Petitioner has raised no genuine issues of material fact to support his claims of ineffective assistance of counsel. To determine whether a defendant received ineffective assistance of counsel, Idaho uses the two-prong Strickland test. Murray v. State, 156 Idaho 159, 164, 321 P.3d 709, 714 (2014). Under Strickland, a defendant must show: (1) that counsel's representation was deficient and (2) that the deficiency prejudiced the defendant's case. Strickland v. Washington, 466 U.S. 668, 687, 687, 104 S. Ct. 2052, 2064 (1984). To prove deficient representation, Petitioner must show that his attorney's representation fell below an objective standard of reasonableness. Id. To demonstrate prejudice, Petitioner must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, Strickland v. Washington, 104 S. Ct. 2052, 2068 (1984). Under the Strickland standard, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690, 104 S. Ct. at 2066.

None of the Petitioners' explicit or implicit claims overcome the strong presumption that his counsel rendered adequate assistance. His claims of ineffective assistance of counsel are not supported by admissible evidence. Instead, his claims are undermined by the record and his written guilty plea. Because petitioner cannot make the requisite showing that he was prejudiced by any alleged deficiency in representation, this Court should summarily dismiss without an evidentiary hearing.

1. The Court should enter summary judgment dismissing Petitioner's First Claim because Petitioner's counsel fulfilled his duty to investigate.

There is no merit to the Petitioner's first claim to ineffective assistance of counsel, where he asserts that his attorney failed to conduct investigation as required by the Sixth Amendment. The United States Supreme Court describes defense counsel's Sixth Amendment duty to investigate as "a duty to make reasonable investigations or to make a reasonable decision that

makes particular investigations unnecessary.” Strickland at 691, 104 S. Ct. at 2066 .The duty to investigate is not boundless, but is limited in scope. Id at 680-81, 104 S.Ct. at 2061. When evaluating whether assistance of counsel was effective, “a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.” Id at 691, 104 S.Ct. at 2066.

Considering the circumstances, including the strength of the State’s cases, the record reveals that additional investigation by defense counsel would have been to no avail¹. The Court explored the adequacy of the investigation during the plea hearing, inquiring,

Q: Have you reviewed the evidence that was provided to your attorney provided [sic] during discovery?

A: Yes, I have.

Q: Is there anything that your attorney has – that you’ve asked your attorney to do that he has not done?

A: No, ma’am.

Q: And have you told your attorney everything that you know about these crimes?

A: Yes, ma’am

Q: Have you had enough time to talk to your attorney?

A: Yes, ma’am.

Q: Are there witnesses who can demonstrate you are innocent of this crime?

A: No, ma’am.

(Tr., pg. 24, ln.17 to pg. 25, ln.8.)

Petitioner agreed he had seen the discovery. Petitioner admitted, during his entry of plea there was nothing he had asked of counsel that had not been done and further admitted there were no witnesses who could demonstrate his innocence. (Tr., pg. 24, ln.17 to pg. 25, ln.14). The purse theft was on video, which was provided to the Petitioner and his attorney in discovery. (Tr., pg. 42, ln.17 to pg. 43, ln.2). Similarly, there were still photos of the Petitioner as he tried to access cash with the victim’s card. (Tr., pg. 58, ln.22 to pg. 59, ln.1). Additionally, the State’s discovery is lengthy, as demonstrated by the presentence report. The Petitioner’s petition does not specifically allege what more investigation should have been done, what such investigation would have revealed, or how he was prejudiced by lack of investigation. Because petitioner has failed to show the requisite prejudice to establish an ineffective assistance of counsel claim, the Court should enter summary judgment dismissing the claim.

¹ The State will discuss the facts of Mr. Leytham's cases together, however the Petitioner is technically only pursuing post conviction relief in case number CR-FE-2014-0003478.

2. The Court should enter summary judgment dismissing petitioner's second claim because Petitioner's counsel adequately advised him on all matters necessary to enter an informed guilty plea.

Because the Petitioner was appropriately advised before entry of plea, the Court should enter summary judgment dismissing the petitioner's second claim. Specifically, the Court should dismiss petitioner's claim that he was not advised on trial strategy and that he was promised probation because these allegations are without merit.

Idaho Courts apply the Strickland test to determine whether a defendant received effective assistance of counsel during plea negotiations. Murray, 156 Idaho at 164, 321 P.3d at 714. When alleging ineffective counsel during the plea process, a Petitioner must demonstrate "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Ridgley v. State, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010). Put another way, demonstrating ineffective assistance during the plea process,

requires a showing that a decision not to accept a plea agreement and plead guilty would have been rational under the circumstances. A bare assertion that one would not have pled guilty and would have insisted on going to trial is insufficient to prevent summary dismissal. *See Ridgley, id.* at 677, 227 P.3d at 931. Instead, a petitioner must link his claim of deficient performance to his decision to plead guilty and demonstrate why the deficiency caused the guilty plea. Id.

Evans v. State, Docket No. Docket No. 40300, 2014 Unpublished Opinion No. 411, 2014 Ida. App. Unpub. LEXIS 113, at *12 (Idaho Ct. App. Mar. 11, 2014).

Where the evidence against the Petitioner was significant on each count, it was not ineffective to advise the Petitioner to enter a plea under a negotiated plea agreement. By going to trial, the Petitioner would have risked a guilty verdict on three counts of Felony Forgery in CR-FE-2014-0003478. In electing to go to trial in CR-FE-2014-0005269, the Petitioner would have risked convictions of a Felony Grand Theft and Felony Possession of a Financial Transaction Card. Additionally, the Petitioner could have been charged as a persistent offender. By negotiating a deal where Petitioner pleaded guilty to only two felonies, counsel ensured that his client would not be convicted of three additional felony charges or treated as a persistent offender at sentencing. The Petitioner cannot demonstrate a reasonable probability that, but for counsel's deficient performance, he would not have pleaded guilty and would have insisted on going to trial. Consequently, the Court should enter summary judgment dismissing the claim.

The Court should dismiss Petitioner's ineffective assistance claim under summary judgment because petitioner failed to demonstrate why any deficiency in counsel's advice caused him to plead guilty. Petitioner makes the bare assertion that counsel failed to adequately advise him of trial strategy, such lack of advice is not prejudicial. See, e.g., Jones v. State, 125 Idaho 294, 296-97, 870 P.2d 1, 3-4 (Ct. App. 1994) (summary dismissal of ineffective counsel claim appropriate where petitioner alleged attorney had not informed petitioner about the trial process but did not also articulate any prejudicial effect from this lack of information). Here, Petitioner has not articulated what prejudicial impact resulted from ignorance of trial strategy, and has not met his burden of showing "that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Ridgley, 148 Idaho at 676, 227 P.3d at 930. Because the Petitioner's allegations do not entitle him to relief as a matter of law, his claim must be dismissed.

Furthermore, the Court should enter summary judgment dismissing the Petitioner's second claim because the record shows that the Petitioner pleaded guilty knowing that the Court was not bound by counsel's sentencing recommendations. Petitioner claims he pleaded guilty because counsel assured Petitioner he would receive probation; however, the record demonstrates that Petitioner pleaded guilty knowing that probation was not guaranteed. The Petitioner was present when the Court inquired of the State whether the State could argue for imposition, saying, "you can argue for imposition[?]" (Tr., pg. 6, lns. 13-15.) To which the State replied, "Yes, Your Honor." (Tr., pg. 6, ln. 15.) The Court went to clarify that the plea was not binding. The following exchange occurred:

Q: What that means is that I can actually give you a 14-year prison sentence in the forgery case and a five-year prison sentence in the financial transaction card case and I can run them consecutive to each other for a total of 19 years without the possibility of parole. Do you understand that?

A: Yes, ma'am.

Q: And I'm not required to follow recommendations of either counsel. Do you understand that?

A: Yes ma'am.

(Tr., pg. 23, lns. 3-14). Clearly Petitioner knew that it was not a binding plea agreement and that there was the possibility of a prison sentence.

Even if counsel had not clarified that the plea was non-binding, the State submits that such a failure could be corrected on the record. Recent appellate court cases are significant:

Murray, 156 Idaho 159, 321 P.3d 709 and Grant v. State, 156 Idaho 598, 605, 329 P.3d 380 (Ct. App. 2014). These cases together indicate that ineffective assistance of counsel, in inadequate information prior to a guilty plea, can be cured when the criminal defendant is fully advised by the Court. Here, Petitioner's exchange with the Court cures any argument that he was not fully advised by counsel. Moreover, when asked by the Court he indicates that he *does* understand the limitations of the deal – which demonstrates that he had already been informed by counsel. Furthermore, when the petitioner described the plea agreement on his written guilty plea, petitioner mentioned no promise of probation. (Guilty Plea, pg. 3 § 9).

Consequently, the Petitioner has not proven by a preponderance of the evidence that his guilty plea was attributable to his counsel's defective performance, or that such performance was prejudicial. This Court should enter summary judgment dismissing the petitioner's second claim.

3. The Court should enter summary judgment dismissing petitioner's third claim because the quality of petitioner's relationship with his counsel does not rise to the level of meriting a remedy.

The Court should enter summary judgment dismissing the Petitioner's third claim because the quality of attorney-client communications here does not warrant post-conviction relief. The Petitioner claims there was a breakdown of attorney-client communications. However, poor communication between lawyer and client, or "a lack of [communication], without allegations of prejudice, is not enough to sustain an ineffective assistance claim." Jones, 125 Idaho at 297, 870 P.2d at 4.

Here, Petitioner has not shown that any attorney-client communication issues produced a prejudicial result. In his First Affidavit, Petitioner alleges that his counsel failed to return phone calls and failed to call petitioner to confirm that a court date had not been rescheduled. While failing to return a phone call, if true, could be an irritation, such behavior renders no attorney's performance ineffective. Petitioner also alleged that Mr. Neville did not show up for the plea hearing on September 10, 2014. However, petitioner concedes that Mr. Blender, another attorney from the same firm represented Petitioner at the hearing. Petitioner also alleges in his Second Affidavit that he spoke to Mr. Blender for a limited time prior to pleading guilty on September 10, 2014. However, when asked by the Court, the Petitioner agreed that he had enough time to speak to his attorney and had told the attorney everything he knew about the crimes. (Tr., pg.24, ln. 25 to pg. 25, ln.5). As Petitioner is only entitled to relief if he can show alleged errors produced a prejudicial result, petitioner's claim should be dismissed.

While an attorney's conflict of interest may warrant post-conviction remedy, no such conflict of interest occurred in this case. The Idaho Supreme Court reasoned that "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Lovelace, 140 Idaho at 61, 90 P.3d at 286. The Ninth Circuit has recently addressed the issue, saying:

Obviously, the word "conflict" is also used in common parlance to describe a personality conflict, an artistic conflict, a family conflict and many others sorts of antagonism – even war. In this context, however, as the Supreme Court cases make clear, we are talking about legal conflicts of interest – an incompatibility between the interests of the two of a lawyer's clients, or between the lawyer's own private interest and those of his client.

Plumlee v. Masto, 512 F.3d 1204, 1210 (9th Cir. 2008). No actual conflict of interest existed in this case and the "quality" of Petitioner's relationship with his counsel does not rise to the level of meriting a remedy. Petitioner has claimed that Mr. Neville had a positive social relationship with the trial Judge.² Even if true, this would have been to the petitioner's benefit. Counsel continued to serve the Petitioner's interests and argued on his behalf at sentencing. Therefore, the Petitioner's third claim should be dismissed pursuant to summary judgment.

4. The Court should enter summary judgment dismissing any possible claims implied in the petitioner's affidavits because petitioner was informed of his rights and responsibilities under the plea deal prior to entry of plea.

To the extent that any additional claims are implied in the petitioner's Affidavits, these allegations do not entitle the Petitioner to post-conviction relief. Petitioner implies in his affidavits certain possible issues, namely that: (A) he was not told he had the right to refuse to participate in the presentence investigation; (B) he was not aware of the restitution his attorney had agreed to when petitioner plead guilty; (C) petitioner could not thoroughly review the presentence report with his counsel; (D) Petitioner was advised against speaking during sentencing; and (E) counsel was ineffective with respect to Petitioner's right to appeal. These claims should be summarily dismissed because Petitioner's allegations are disproven by the record of the criminal proceedings and his allegations do not justify relief as a matter of law.

A. Petitioner was informed by the Court he retained his right to silence, but that his plea deal depended on his participation in the presentence investigation.

² The State does not concede the accuracy of this point, but will treat it as true merely for the purposes of our briefing.

Although the Petitioner claims he was not informed of his right to refuse to participate in the presentence investigation, this is disproven by both the record and his written guilty plea. In his written plea, Petitioner acknowledged his right to silence and his right to refuse to participate in the presentence investigation. (Guilty Plea, pg. 1 § 2, pg. 6 § 32-33). Additionally, the plea hearing transcript reflects that this area was the subject of close scrutiny by the Court. Specifically, the Court inquired:

THE COURT: Have you discussed with your client the fact that I'm going to order a presentence investigation report to be prepared. And in this case I'm also going to order a 19-2524 evaluation and that anything he says during those examinations may be used against him at sentencing?

MR. BLENDER: Yes, your Honor. That is in the guilty plea form so we talked about that when he signed it.

THE COURT: All right. And did you explain to him that he has a constitutional right to remain silent during that examination, but as part of the plea agreement, he agreed to waive that right?

MR. BLENDER: Absolutely.

THE COURT: And was that his decision and his decision only?

MR. BLENDER: He said he understood it and he would engage with the process.

THE COURT: And have you explained to him that if he doesn't engage in the process, the State will no longer be bound by its agreement?

MR BLENDER: Yes.

(Tr., pg. 14, ln. 25 to pg. 15, ln.23.) The Petitioner was informed that he retained the right to silence regarding answering questions that might increase his sentence, but that his plea deal depended on his participation in the presentence investigation. The record and written guilty plea form demonstrate that petitioner's claim is patently false.

Even assuming arguendo the Petitioner was not adequately advised prior to the Court's comments, he would not merit relief. The Court can cure the absence of such information prior to the plea. See Murray, 156 Idaho 159, 321 P.3d 709 and Grant, 156 Idaho at 605, 329 P.3d 380. Because Petitioner was aware of his right to silence and his right to refuse participation in the presentence investigation, the State moves to dismiss the petitioner's implied claim that counsel provided ineffective assistance at the time of his plea.

B. Petitioner cannot demonstrate that counsel's performance was ineffective because petitioner was informed of his obligation to pay restitution when he pleaded guilty, and he did not object to the restitution amount at sentencing.

The Petitioner's implied claim of ineffective assistance of counsel regarding restitution should be dismissed because his allegations do not present prima facie evidence of deficient performance. In his Second Affidavit, Petitioner implies that his counsel's performance was deficient because he did not inform petitioner of the exact amount of restitution when he pleaded guilty. Even if true, this allegation would not rise to the level warranting a remedy, and therefore the claim should be dismissed under summary judgment. Further, this claim is clearly belied by the record.

To avoid summary dismissal on a claim of an ineffective counsel regarding restitution, Petitioner must present prima facie evidence that his attorney failed to "either inform his client of the risk of a restitution order as a consequence of a contemplated guilty plea or to object to the State's request for restitution at or after sentencing when the defendant was not previously informed of that consequence." Hayes v. State, 143 Idaho 88, 93, 137 P.3d 475, 480 (Ct. App. 2006). Here, petitioner cannot make such a showing.

Restitution was explicitly a condition of the plea agreement, as described by the prosecutor prior to entry of plea. (Tr., pg. 4, lns. 10-15.). The Court clarified that as part of the plea agreement the Petitioner agreed to pay be restitution on all of the dismissed charges, restitution on case DR-2014-41181, with such restitution being subject to a civil judgment. (Tr., pg. 4, ln.10 to pg. 6, ln. 23; pg. 8, lns. 15-25). After describing the restitution which Petitioner was agreeing to pay by pleading guilty, the Court confirmed with defense counsel that the Court's understating was "an accurate reflection of the plea agreement." (Tr., pg. 8, lns. 1-3).

The Court specifically inquired whether the Petitioner himself understood that he was agreeing to pay restitution by pleading guilty. Exploring the adequacy of Petitioner's understanding of his restitution obligations, the Court asked:

Q. Now you understand that you're agreeing to pay restitution in all of these cases including the dismissed cases. Do you understand that?

A. Yes, ma'am.

Q. And you're also agreeing to pay restitution in the case that's the DR case, 2014-411861. Do you understand that?

A. And which one would that be, ma'am?

Q. That's the one that – it's the one that they're not going to file on.

A. Yes.

(Tr., pg. 23, ln.15 to pg. 24, ln.1). The Court closely scrutinized the petitioner's understanding of his restitution obligations under the plea agreement, later examining into the sufficiency of his written guilty plea. The Court inquired:

Q. And do you understand again about the requirement that you're going to have to pay restitution to your victims?

A. Yes ma'am.

Q. And I noticed that you crossed yes and then it looks like over no it says -- you wrote L -- it looks like a signature but I'm not positive. It looks like an initial. But do you understand that you have to pay restitution to the victims?

A. Yes, ma'am.

(Tr., pg. 27, lns. 7-17). The Petitioner's responses demonstrate that he clearly understood that he was obligated to pay restitution, and that he was aware of the amount of restitution. He acknowledged this responsibility multiple times directly to the Court and through his attorney. Petitioner had access to discovery documents that indicated restitution would be significant in his cases. Restitution ultimately amounted to \$55,331.92 and \$202.75 in Petitioner's cases. (Tr., pg. 36, ln.20 to pg. 37, ln. 7). As to the higher figure, that exact figure, \$55,331.92 was in police reports, DR 411861, which were provided to the petitioner prior to the plea. (Tr., pg. 4, lns.3-17.)³ The Petitioner had reviewed the discovery prior to the plea. (Tr. Pg. 24, lns. 17-20.) Thus, the record reflects that the petitioner knew the figure prior to entry of plea.

Neither the Petitioner nor his attorney objected to the amount of restitution requested at sentencing. After the prosecutor identified the precise restitution figures, the Court confirmed with defense counsel that the restitution figures were appropriate. The Court asked:

THE COURT: Is that -- is the amount of restitution, is that something he's going to be agreeing to?

MR. NEVILLE: It is, Your Honor.

THE COURT: And do you believe there's a sufficient basis to impose those amounts?

MR. NEVILLE: I do.

(Tr., pg. 36, lns. 8-14). Not only did counsel acknowledge that petitioner agreed to pay that specific amount, counsel also conceded there was a sufficient basis to impose the restitution. The

³ Those same reports were also in the PSI. (See final page of Brad Thorne's Supplemental Report , as attached to the PSI.)

Court only ordered restitution after confirming with defense counsel that restitution figures were appropriate.

The Court should dismiss the Petitioner's claim of ineffective counsel considering that the Petitioner pleaded guilty knowing that he had to pay restitution under the plea deal, at a time that he had the reports which designated the exact amount later ordered, and because the Petitioner did not object to the amount of restitution at sentencing. He has not made a prima facie showing that counsel ineffectively advised him about restitution obligations under the plea deal.

C. Because petitioner was able to review the presentence report with his attorney, any implied claim of ineffective counsel should be dismissed.

Although petitioner claims he did not believe his counsel reviewed his presentence reports or evaluations thoroughly with him, such an allegation does not entitle the petitioner to relief. For example, the petitioner in *Jones* could not overcome summary judgment dismissal of an ineffective assistance claim when he alleged that was prevented from reviewing the presentence report. *Jones*, 125 Idaho at 296-97, 870 P.2d at 3-4. Although the report was discussed extensively during sentencing, the petitioner did not object to either his inability to review the report or to the contents of the report. *Id.* The Court of Appeals reasoned:

Even assuming the facts alleged in Jones' affidavits are true, Jones has failed to allege any errors or corrections he would have made at sentencing. Because he has failed to indicate what errors were contained in the presentence report that resulted in prejudice, Jones is not entitled to relief. Therefore, the state, as a matter of law, is entitled to summary judgment. The district court did not err in summarily dismissing the application for post-conviction relief on these grounds.

Id.

Here, like in *Jones*, the State is entitled to summary judgment as a matter of law. The record directly contradicts defendant's claim that he was unable to review the report. The petitioner was asked this precise question by the Court and answered in the affirmative:

And with regard to the presentence materials, have both parties had a full opportunity and sufficient time to examine those presentence materials?... Mr. Leytham, have you read those materials?"

The petitioner responded, "Yes, ma'am.
(Tr., pg. 36, ln.22 – pg. 37, ln.5.) .

The record indicates that defense counsel was provided the 19-2522 report by the State and read the report to the Petitioner when he could not read it himself. (Tr., pg. 37, ln.19- pg. 38, ln.7). When asked by the Court if there were any errors in the presentence report, defense

corrected minor clerical errors. (Tr., pg. 39, ln. 5- pg. 39, ln.10.) Mr. Neville's correction of the record regarding Petitioner's foot surgery was not substantively significant. However it indicates the Petitioner and his attorney had reviewed and discussed the report. Neither Petitioner nor his counsel objected to anything in the presentence report when it was discussed by the prosecutor and Court at sentencing. Most importantly, the Petitioner identified no errors in the presentence report that would have caused prejudice. Consequently, the Court should enter summary judgment dismissing the claim.

D. Petitioner cannot demonstrate that counsel was ineffective in advising Petitioner not to speak at sentencing.

Advising a client not to speak during sentencing is a tactical decision. The Petitioner has not shown counsel's choice of tactics was "was unsound or that it resulted from any shortcomings in counsel's knowledge or preparation." Huck v. State, 124 Idaho 155, 160, 857 P.2d 634, 639 (Ct. App. 1993). Petitioner has not articulated how such choice of tactics constituted ineffective assistance of counsel, or how such advice prejudiced petitioner. Therefore, any implied claim that that counsel was ineffective in advising petitioner not to speak at sentencing should be summarily dismissed.

E. Petitioner cannot prove counsel was ineffective respective to his right to appeal.

The Petitioner cannot meet his burden demonstrating that his attorney rendered ineffective assistance of counsel by failing to file an appeal. Where a Petitioner has instructed counsel to file an appeal, but counsel did not do as directed, there may be a successful post-conviction claim. See Gosch v. State, 154 Idaho 71, 76, 294 P.3d 197, 202 (Ct. App. 2012). However, that is not the case here. The Petitioner does not allege that he requested an appeal be filed. Instead, he merely alleges that his counsel did not speak to him about his right to appeal. (Second Affidavit, pg. 2 paragraph 26.)

Where, as here, the Petitioner did not request an appeal, the review is more strict. The United States Supreme Court held "that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1033 (2000). So, counsel had a duty to consult IF there were non-frivolous grounds for an appeal or if the petitioner demonstrated a desire to appeal.

Once the duty to consult is established and counsel is shown to have been lacking in this regard, there still must be a showing of prejudice:

Once counsel's performance has been shown to be deficient, the defendant must demonstrate actual prejudice by showing that there is a reasonable probability that, but for counsel's deficient failure to consult with him or her about an appeal, the defendant would have timely appealed. In ascertaining whether a defendant has made the requisite showing of prejudice, courts may consider whether there is evidence of nonfrivolous grounds for appeal or the defendant in question promptly expressed a desire to appeal. *Citations omitted.*

Goodwin, 138 Idaho at 273-74, 61 P.3d at 630-31. .

Even assuming *arguendo* that it were true that counsel had failed to consult with Petitioner about his appeal rights, Petitioner's allegations do not merit a remedy. Notably, the Petitioner knew of his rights to appeal, as the Court explicitly advised the Petitioner of his appeal rights at sentencing. (Tr., pg. 64, lns.14-20). Although the record shows petitioner knew of his appeal rights, Petitioner never alleges that he directed his attorney to appeal or that he even wanted an appeal. Petitioner does not identify what the non-frivolous grounds for appeal would have been. Consequently, Petitioner has not demonstrated how he was prejudiced by his attorney's alleged failure to consult regarding appeal rights. Because Petitioner has not identified how he was prejudiced by ineffective assistance of counsel, the claim should be summarily dismissed.

Furthermore, Petitioner cannot demonstrate that counsel knew or should have known that a rational defendant in their client's position would have wanted to appeal. In determining whether a rational defendant would have wanted to appeal, "courts must take into account all the information counsel knew or should have known." State v. Goodwin, 138 Idaho 269, 273, 61 P.3d 626, 630 (Ct. App. 2002). For example, summary dismissal of an ineffective counsel claim was proper in Goodwin because petitioner has not shown that a rational defendant in his position would want to appeal the denial of his or her Rule 35 motion State v. Goodwin, 138 Idaho 269, 273, 61 P.3d 626 630 (Ct. App. 2002). The Court examined the information that counsel knew or should have known, which included the facts that:

- (1) Goodwin pled guilty to burglary, a felony punishable by imprisonment for not less than one nor more than ten years pursuant to I.C. § 18-1403; (2) Goodwin's sentence was within the statutory sentencing range; (3) Goodwin's offense involved the taking of more than \$ 238,000 worth of coins from a residence; (4) by pleading guilty Goodwin indicated a desire to end judicial proceedings; (5) Goodwin did not appeal from his judgment of conviction or sentence; (6) in

his Rule 35 motion, Goodwin did not challenge the legality or excessiveness of his sentence, or submit any additional evidence in support of his motion, but merely requested that the district court reconsider the sentence imposed; (7) Goodwin's presentence investigation report indicated that he had a significant criminal record, with numerous felonies involving stolen property; (8) the presentence investigator recommended imprisonment because Goodwin was not a suitable candidate for probation; and (9) appellate review of the denial of a Rule 35 motion involves a determination of whether a defendant's sentence was reasonable at the time of pronouncement or whether the defendant has shown that his or her sentence is excessive in light of additional information submitted in support of the motion.

Id at 273, 61 P.3d at 630. The Court concluded that dismissal was proper because there was no reasonable possibility that Goodwin's sentence would have been reduced had he appealed, "particularly in light of the severity of Goodwin's offense, his character and criminal record, and the standard applied by Idaho appellate courts in reviewing the denial of a Rule 35 motion." *Id* at 274, 61 P.3d at 631.

Just as in *Goodwin*, dismissal is proper here because petitioner cannot demonstrate that counsel knew or should have known that a rational defendant in their client's position would have wanted to appeal. The facts here are remarkably similar to Goodwin in that the information that Mr. Neville knew or should have known included: (1) Leytham pled guilty to two felonies (2) Leytham's sentence was within the statutory sentencing range; (3) Mr. Leytham's offense involved taking more than \$50,000 from an elderly victim and stealing a woman's purse; (4) by pleading guilty Leytham indicated a desire to end judicial proceedings; (5) in his Rule 35 motion, Mr. Leytham did not challenge the legality or excessiveness of his sentence, or submit any additional evidence to support his motion, but merely requested that the district court reconsider the sentence imposed; (6) Mr. Leytham's presentence investigation report indicated that he had a significant criminal record, with numerous felonies involving stolen property; (7) the presentence investigator recommended imprisonment because Leytham was not a suitable candidate for probation. (Tr., pg. 30, ln.11 to pg. 31, ln.22); (Tr., pg. 62, lns. 1-19); (Tr., 35 ln. 24- pg. 36, ln. 7).

Here, the Court should dismiss petitioner's claim of ineffective counsel. There was no reasonable possibility that Mr. Leytham's conviction would have been overturned or that his sentence would have been reduced had he appealed, particularly because of the severity of Mr. Leytham's offense and his character and criminal record.

5. The Court should dismiss Petitioner's implied claim that his plea was made while under the influence because none of the Petitioner's medications impaired his ability to enter an informed guilty plea.

The record undermines any argument that petitioner's medications impaired his ability to enter a plea. Consequently, the claim should be summarily dismissed without an evidentiary hearing. To determine whether a plea is knowing, voluntary, and understood

entails inquiry into three areas: (1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial to confront his accusers, and to refrain from incriminating himself; and (3) whether the defendant understood the consequences of pleading guilty.

State v. Colyer, 98 Idaho 32, 34, 557 P.2d 626, 628 (1976). Courts should consider all of the relevant surrounding circumstances contained in the record to determine if a guilty plea was knowing and voluntary.

For example, the Court in Workman v. State relied on the record dismissing the petitioner's claim that his plea was involuntary because his medication impaired his ability to enter a plea. Workman v. State, 144 Idaho 518, 527-28, 164 P.3d 798, 807-08 (2007). There, petitioner had been medicated at plea entry and the district judge had,

an opportunity at that time to question Workman to determine his competence and rational understanding of the proceedings. The district judge thoroughly documented the evidence in the transcript of the hearing at which Workman changed his plea and noted her personal observations that "[t]hroughout the hearing, Workman answered the Court's questions appropriately; moreover, he exhibited no behavior that indicated an inability to concentrate or an impairment of his motor or cognitive skills."

Id. The Supreme Court concluded that, based on the record, Workman's claim alleging his medication rendered his plea involuntary was insufficient to raise an issue of material fact; therefore "district judge did not err in dismissing, without an evidentiary hearing, Workman's claim that his plea was involuntary." Workman v. State, 528 Idaho 518, 164 P.3d 798 (2007)

Just like in Workman, here the record demonstrates that Petitioner's medications did not impair his ability to enter a knowing and voluntary guilty plea. At the plea hearing, Petitioner's attorney pointed out that petitioner was on medication, including high cholesterol medication, depression medication, and naproxen and hydrocodone for neck pain. (Tr., pg. 10, ln.2 to pg. 14, ln.6). Petitioner's attorney noted that any concern he had over the entry of plea was "more based

on what he might be taking than how he was talking. ... I didn't see anything that would make me believe anything other than he was being strictly rational." (Tr., pg. 11, lns.6-12). In response, the Court inquired into the possible effect of petitioner's medication, asking Petitioner:

Q. Now you've indicated that you've been taking a pill for depression and some other medications and some Hydrocodone for your neck pain; is that correct?

A. Yes, Your Honor.

Q. Are you having any difficulty understanding these proceedings?

A. No, ma'am.

Q. And you've been taking all of these medications for some time, about 45 days you said.

A. Just take depression for 45. The rest of them I've been taking since 2005.

Q. Okay. Normally by this time any of these medications any effects have been stabilized. But I just want to make sure you are having any sleepiness or any difficulty understanding what we are talking about today?

A. No, Your Honor.

Q. Did they make you more susceptible to Mr. Blender's suggestions?

A. Yes, Your Honor.

Q. They did? So your -- Mr. Blender's suggestion -- these medications made you more susceptible to those?

A. No, ma'am. I'm sorry. I misunderstood you.

Q. You misunderstood my question?

A. Yes, ma'am.

Q. Okay. And these are your decisions, not Mr. Blender's decisions?

A. Yes, ma'am.

Q. And again, just for the record, his answers seem appropriate to me, his affect is appropriate. We've got great contact. He's not slurring his words. He doesn't appear sleepy. His answers do not seem inappropriate to me.

(Tr., pg. 19, ln.25 to pg. 21, ln.14). After examining the Petitioner regarding his medication, the Court asked questions regarding his mental health and whether he understood the consequences of pleading guilty. (Tr., pg. 21, ln.24 to pg. 22, ln.20). Having examined the Petitioner to see if his medication or mental health had affected his ability to enter a plea, and having examined petitioner's understanding of the plea deal, the district judge concluded that the "guilty plea was knowingly and voluntarily given." (Tr., pg. 32, ln.8).


Based upon the colloquy between the Court and Mr. Leytham, there is ample evidence that Petitioner's plea was knowingly and voluntary, and that he had a rational understanding of the proceedings. The District Court's examination into petitioner's mental capacity and understanding of his plea indicates that neither the Court, defense attorney, nor Petitioner himself believed the medications affected his understanding of his guilty plea. Consequently, Petitioner's claim that medications affected his ability to enter a knowing and voluntary plea should be dismissed pursuant to summary judgment without an evidentiary hearing.

CONCLUSION

The State moves for dismissal of each and every claim. Post-conviction proceedings need not, in every circumstance, proceed to an evidentiary hearing. In fact, when "it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law," the Court may grant a motion for summary disposition. I.C. §19-4906(c). Such is the case here and the State hereby moves the Court to dismiss the petition in its entirety.

DATED this 27th day of July 2015.

JAN M. BENNETTS
Ada County Prosecuting Attorney

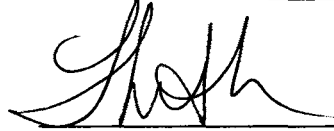

By: Shawna Dunn
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of July 2015, I caused to be served, a true and correct copy of the foregoing Motion for Summary Dismissal upon the individuals named below in the manner noted:

Name and address: Lance Fuisting, Ada County Public Defender, 200 W. Front St. Room 1107, Boise, Idaho 83702

- ☐ By depositing copies of the same in the United States mail, postage prepaid, first class.
- ☒ By depositing copies of the same in the Interdepartmental Mail.
- ☐ By informing the office of said individual(s) that said copies were available for pickup at the office of the Ada County Prosecutor.
- ☐ By faxing copies of the same to said attorney(s) at the facsimile number: _____.



AUG 24 2015

CHRISTOPHER D. RICH, Clerk
By **ARIC SHANK**
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant

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Boise, Idaho 83702
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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

JIMMY D. LEYTHAM,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-PC-2015-2841

**OBJECTION TO MOTION FOR
SUMMARY DISMISSAL**

COMES NOW, the petitioner, Jimmy D. Leytham, by and through counsel, Lance Fuisting, of the Ada County Public Defender's Office and herein objects to the State's Motion for Summary Dismissal to his Petition for Post-Conviction Relief pursuant to I.C. § 19-4906(c) on the basis that genuine issues of material fact have been raised by the petitioner in his pleadings which require an evidentiary hearing to be held and that his petition for post conviction relief should be granted.

OBJECTION TO MOTION FOR SUMMARY DISMISSAL



STANDARD OF REVIEW

Mr. Leytham's claims involved allegations that he received ineffective assistance of counsel during his guilty plea and sentencing. The Sixth Amendment right to counsel guarantees a criminal defendant effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Idaho has adopted the *Strickland* two-prong test in evaluating whether a criminal defendant was denied the right to effective assistance of counsel. *Dunlap v. State*, 141 Idaho 50, 59 (2004). Specifically, a defendant must prove both that his or her counsel's performance was deficient, and that counsel's deficient performance prejudiced his or her case. *Id.* To show deficient performance, a defendant must demonstrate that his or her attorney's representation fell below an objective standard of reasonableness. *Id.* To show prejudice, the defendant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the case would have been different. *Id.* A defendant must prove his claims by a preponderance of the evidence. *Id.* at 56. Even if individual claims do not independently show prejudice, the Court must consider whether the accumulation of error creates the degree of prejudice entitling a petition to relief. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992).

When assessing the reasonableness of counsel's decisions, this Court owes deference to counsel's strategic decisions; however, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470 481 (2000) (citation omitted).

Mr. Leytham asserts all claims of ineffective assistance of counsel alleged satisfy both prongs of the *Strickland* analysis. Specifically, Mr. Leytham's claims for relief show (1) a deficiency in trial counsel's performance, and (2) that Mr. Leytham was prejudiced by the deficient performance. *See generally Strickland*, 466 U.S. at 687. Mr. Leytham alleges that

even if some individual claims do not meet the governing level of prejudice independently, when considered collectively, the accumulation of error creates prejudice entitling him to relief.

Blodgett, 970 F.2d 614.

Idaho Code § 19-4906 authorizes summary disposition of an application for post-conviction relief, either upon the motion of a party or at the court's own initiative. *Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 491 (Idaho App. 1995). Summary dismissal is permissible only if the applicant's evidence has raised no genuine issue of material fact, which, if resolved in the applicant's favor, would entitle him to the requested relief. *Id.* If such a factual issue is presented, an evidentiary hearing must be conducted. *Id.* ¹

¹ The State has argued in its Motion for Summary Dismissal that Mr. Leytham's claims are clearly disproven by the record. Several of Mr. Leytham's claims involve communications or lack thereof with his counsel in the underlying criminal case, and many of those claims are not addressed in the record. On May 26, 2015, Mr. Leytham requested that this Court allow him to conduct a deposition of his counsel on the underlying case to address the issues he has presented which are not in the record. This Court denied the Motion for Discovery on June 3, 2015.

ISSUES PRESENTED

- I. Did Mr. Leytham receive ineffective assistance of counsel based upon a failure to investigate the issues in his case?**
- II. Did Mr. Leytham receive ineffective assistance of counsel based upon a failure to advise him correctly about his guilty plea?**
- III. Did Mr. Leytham receive ineffective assistance of counsel based upon a breakdown in communications between himself and counsel?**

ARGUMENT

I. Mr. Leytham received ineffective assistance of counsel based upon a failure to investigate the issues in his case.

Trial counsel must conduct a reasonable investigation. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). (“[W]e focus on whether the investigation supporting counsel’s decision . . . was *itself* reasonable.” (emphasis in original) (citation omitted)); *Strickland*, 466 U.S. at 691 (holding that counsel has a “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary”); *Conner v. Quarterman*, 477 F.3d 287, 296-94 (5th Cir. 2007). (The judgment is whether counsel’s investigation was reasonable, not whether counsel’s trial strategy was reasonable.”) (citation omitted).

The most glaring and prejudicial deficiency regarding a failure to investigate involved counsel’s failure to obtain Mr. Leytham’s medical records. In page 2 of Mr. Leytham’s Second and Final Affidavit in Support of Petition for Post Conviction Relief, Mr. Leytham states:

- 12) I told Mr. Neville about my medical conditions.
- 13) Mr. Neville did not attempt to obtain my medical records.
- 14) There was no proof about my medical conditions to supply to the Court at the time of sentencing.

The lack of documentation of medical conditions was clearly viewed as an aggravating factor by this Court at the Sentencing Hearing held on December 31, 2014. (Transcript of Proceedings December 31, 2014, The Honorable Cheri C. Copsey, pp. 50-53) (Hereinafter, TR. December 31, 2014). At that hearing, the following exchange occurred after Mr. Neville attempted to explain some of Mr. Leytham’s medical conditions to the court:

THE COURT: We never got copies of any medical records other than Dr. Verska and then the letter from his internist; is that correct?

MR. NEVILLE: That’s correct.

OBJECTION TO MOTION FOR SUMMARY DISMISSAL

THE COURT: So these are just what he says.

MR. NEVILLE: Correct.

THE COURT: Thank you.

MR. NEVILLE: However, I - - well, from what he's telling me, this foot surgery is something that's been diagnosed in his recent stay. Also, I think the thing he's suffering from the most is his lupus.

THE COURT: Where is the evidence that he has lupus?

MR. NEVILLE: Well, just an example, I think the Ada County Jail has even called in a specialist recently on this because they're not finding - - they're not being successful in treating it. I can attest that any time - -

THE COURT: Because his internist does not list lupus as a diagnosis and he's not taking medication for lupus.

THE DEFENDANT: Yes, ma'am, I am.

THE COURT: I'm not going to - - I'm not asking you.

THE DEFENDANT: Sorry.

MR. NEVILLE: Your Honor- -

THE COURT: The only medical record that I have - - I have nothing from the jail. The only medical records that I have is the undated letter from Dr. Verska which doesn't tell me anything other than he's not capable of working. And the other letter I have is from the other doctor, which I can go back and figure out what the name is, and he indicates he has allergies - - I'm trying to remember. The medication he's taking is for allergies.

MR. NEVILLE: Your Honor, if I could ask my client.

THE COURT: Well, I'm not - - to be honest with you, I haven't found your client to be a very honest person based on what's in this presentence and the fact that we have - - we have pictures of him stealing, so

MR. NEVILLE: I understand.

THE COURT: I know he writes this stuff.

MR. NEVILLE: I understand.

OBJECTION TO MOTION FOR SUMMARY DISMISSAL

THE COURT: -- but that doesn't tell me anything.

MR. NEVILLE: I understand the Court is—doesn't have much reason to believe him
(TR. December 31, 2014, p. 51 L.6 – p.53 L. 6).

The relevant inquiry under the case law is whether it was a reasonable decision not to investigate the medical conditions and provide documentation to the Court prior to attempting to argue them to the Court at the sentencing. In terms of prejudice to Mr. Leytham, this failure to conduct an investigation offered the Court another opportunity to question Mr. Leytham's credibility and what could have become a mitigating factor at sentencing became an aggravating factor. Therefore, it was an unreasonable decision not to obtain the medical records, which amounted to ineffective assistance of counsel on both *Strickland* prongs.²

II. Mr. Leytham received ineffective assistance of counsel based upon a failure to advise him correctly about his guilty plea?

A defendant's constitutional right to counsel extends to the "critical stages" of proceedings. *U.S. v. Wade*, 388 U.S. 218, 224-25, 87 S.Ct 1926, 19 L Ed. 1149 (1967). "Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *Padilla v. Kentucky*, 559 U.S. 356, 364, 130 S.Ct. 1473, 176 L.Ed 2d 284 (284).

Mr. Leytham has alleged numerous deficiencies on behalf of counsel in regards to advice regarding his guilty plea. On page 2 of his First Affidavit of Petitioner, Mr. Leytham makes the following claims regarding his guilty plea:

13. When I spoke to Mr. Neville in person, he explained that he had this "great deal" worked out for me. I explained to Mr. Neville that I did not want to enter into a guilty plea as I was not guilty.

² The medical records were subsequently obtained by Mr. Leytham's Post Conviction counsel and filed as an addendum to his Motion for Reconsideration of Sentence under Idaho Criminal Rule 35 on April 28, 2015. That motion was denied without objection from the State on April 30, 2015.

14. Mr. Neville informed me, "... hey, do not worry about it, just plead guilty and they are going to give you probation."
15. At the time I appeared before the Court, the Court read to me the Guilty Plea Advisory Form. When I was asked if, "... there has been any type of promises to you," Mr. Neville told me to say there was no promises. I asked about the probation he had promised. Mr. Neville told me, "... that is not what the Court is asking about."
16. I informed Mr. Neville, "sir, I need some time to think about this". Mr. Neville told me, "Hey, this is a done deal, you are going to get probation, so you have about 15 minutes, just plead guilty and you will get probation."
17. I did as my attorney advised me to do. I entered the plea of guilty. However, when the Court sentenced me, I received a sentence of ten (10) years. . .

The State has pointed out that Mr. Leytham's allegations in his affidavit are not consistent with his answers on the Guilty Plea Advisory Form, nor are they consistent his answers to the Court during his guilty plea. Mr. Leytham has indicated that he did not fill out the Guilty Plea Advisory Form entirely on his own and that he was being advised to answer the Court's questions a certain way by his counsel during his guilty plea. Most of the conversations with his attorney to which he alludes are not a part of the record. Mr. Leytham has attempted to conduct discovery during his post conviction case to clarify these issues of fact; however, this Court has denied his request. Because his allegations create genuine issues of fact that would have amounted to ineffective assistance during his guilty plea, which is a critical stage of the proceedings, he should be entitled to an evidentiary hearing on this issue.

The same holds true for Mr. Leytham's allegations about Mr. Neville claiming to have a positive social relationship with the judge. We know what Mr. Leytham has said in his affidavit, but we have not formally heard Mr. Neville's side of that discussion. Again, a deposition would have been helpful. The State has argued that even if that allegation was true, it would have worked to Mr. Leytham's benefit. Clearly, given Mr. Leytham's dissatisfaction with his

sentence, whatever situation existed did not work to his benefit. However, an evidentiary hearing is required to determine this issue of fact because it is not a part of the record.

III. Mr. Leytham received ineffective assistance of counsel based upon a breakdown in communications between himself and counsel.

The Idaho appellate courts have recognized the claim of ineffective assistance of counsel for counsel's failure to communicate. *Thomas v. State*, 145 Idaho 765, 768, 185 P.3d 921, 924 (Idaho App. 2008). Mr. Leytham has made several allegations related not only to failure to communicate, but also what could be deemed unreasonable communications under *Strickland*.

In his First Affidavit, Mr. Leytham makes the following allegations:

9. I was scheduled for a court hearing on September 10, 2014. I spoke to Mr. Neville and he told me that he would contact me on the 7th of September to see if I could reschedule the court date on the 10th.
I asked this to be rescheduled because I had a job out of town and I did not know if I could get back before the court date.
10. Mr. Neville never did contact me as to whether or not my court date was rescheduled.
11. When I returned from out of town, I did make it to my court date on the 10th of September, 2014. However, Mr. Neville did not show up. He forgot about me and my court date. A Mr. Brian Blender filled in for Mr. Neville; but Blender did not know about my case.
12. My wife called Mr. Neville's telephone several times to find out what was going on and what happened to him at the court date. There was never any type of return call from Mr. Neville.

In his Second Affidavit, Mr. Leytham makes the following allegations regarding lack of or ineffective communications:

4. On the day I plead guilty, September 10, 2014, Brian Blender, who works with Mr. Neville, appeared to represent me.
5. I did not know Mr. Blender would be appearing prior to September 10, 2014.
6. I only had a 7 to 10 minute discussion with Mr. Blender prior to pleading guilty on September 10, 2014.

7. Mr. Blender and I did not discuss restitution on September 10, 2014.
8. I was taking numerous medications at the time of my change of plea.
9. I believe the medications I was taking on September 10, 2014, impacted my ability to understand the proceedings.
10. I initially informed the Court that the drugs I was on made me more susceptible to suggestions from Mr. Blender during my change of plea on September 10, 2014.
15. Neither Mr. Neville or Mr. Blender explained to me that I had a right not to participate in the presentence investigation process.
16. There was no discussion about the restitution amount during my change of plea hearing.
17. At sentencing, my attorney agreed to \$55,331.92 in restitution for uncharged conduct on my behalf. I was never asked if I agreed to that amount.
18. I believed the restitution was \$202.75. That was the amount in my presentence report.
19. My attorney did not show me the presentence report until the day of sentencing.
20. My attorney only showed me Dr. Arnold's evaluation on the day of sentencing.
21. I was unable to read the presentence report and evaluation myself because of a medical condition.
22. I do not believe my attorney read me Dr. Arnold's evaluation in its entirety.
23. I do not believe my attorney thoroughly reviewed the presentence report and evaluations with me.
24. My attorney only read the recommendations section of the presentence report to me.
25. I was advised not to say anything when I had the opportunity to address the Court at sentencing.
26. Neither Mr. Neville nor Mr. Blender spoke to me about my right to appeal my sentence.
27. No appeal of my sentence was filed.

While there is an indication from the record that there was some degree of communication between the attorneys and Mr. Leytham, it is important to consider the

reasonableness of that communication based on the fact that Mr. Neville made the following statement about Mr. Leytham at sentencing:

“I do not think Mr. Leytham is somebody who sees himself as a liar. I do think he has an extremely hard time with his memory. From one conversation to the next he does not track nor does he remember what we’ve talked about.” (TR. December 31, 2014, p.53).

Moreover, at the change of plea hearing on September 10, 2014, Mr. Blender made the following statement to the court regarding whether he had reason to believe that Mr. Leytham was under the influence of alcohol or medication:

“He—there were some other medications. He may not know what they are that he could be under the influence of, but he seems mostly rational.” (Transcript of Proceedings, September 10, 2014, The Honorable Cheri C. Copsey, p. 10, L. 6-9).

At no point did either counsel request that Mr. Leytham’s competency be evaluated or that proceedings be continued in spite of making the record that he does not remember their conversations and that he might be taking medications that “he could be under the influence of.” In *State v. Cobb*, it was error for the district court to summarily dismiss the defendant’s application for post conviction relief without granting an evidentiary hearing, where there existed a material issue of fact as to whether the defendant was under the influence of prescribed drugs which affected his ability to make a knowing, intelligent, and voluntary guilty plea. 100 Idaho 116, 594 P.2d 154 (1979). In light of the knowledge that both counsel had of Mr. Leytham’s issues, it was not objectively reasonable for them to proceed with a guilty plea or sentencing under the circumstances, nor was it objectively reasonable to proceed with substitute counsel who only had a short period of time to meet with Mr. Leytham prior to his entry of a guilty plea. Mr. Leytham has indicated that he did not want to plead guilty, but he did so based on representation from counsel that he would receive probation. We have no real evidence to controvert his claim, which mandates an evidentiary hearing.

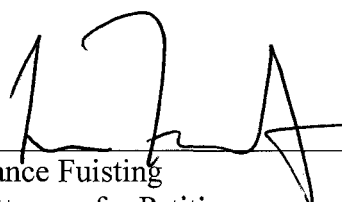
Additionally, it is clear from the record that the significantly-higher restitution amount for the uncharged conduct was never mentioned in open court at either hearing prior to the judgment, nor was Mr. Leytham ever personally asked on the record if he agreed to that amount.

There is not clear evidence in the record to controvert Mr. Leytham's claim about the amount of time his attorney spent with him reviewing the presentence materials, although the transcript suggested that that discussion did happen close to the time of sentencing.

It is clear from the record that no appeal of Mr. Leytham's sentence was filed. A defendant's right to representation by counsel extends to all critical stages of his trial, including appeal. *Beasley v. State*, 126 Idaho 356, 359, 883 P.2d 714 (Idaho App. 1994). Mr. Leytham contends that he never had any discussions about an appeal with either attorney. We do not know what the attorneys' position is on that claim. All of these questions of fact suggest that an evidentiary hearing is appropriate.

Conclusion

The State's Motion for Summary Judgment should be denied because genuine issues of material fact have been raised by the petitioner in his pleadings which require an evidentiary hearing to be held and his petition for post conviction relief should be granted.



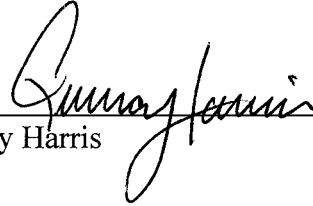
Lance Fuisting
Attorney for Petitioner

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 24 day of August 2015, I mailed (served) a true and correct copy of the within instrument to:

Shawna Dunn
Ada County Prosecuting Attorney

Quincy Harris

A handwritten signature in cursive script, appearing to read "Quincy Harris", is written over a horizontal line.

AUG 28 2015

CHRISTOPHER D. RICH, Clerk
By KRISTI DUMON

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY D. LEYTHAM,

Petitioner,

Case No. CV-PC-2015-02841

vs.

**ORDER GRANTING SUMMARY
DISMISSAL**

THE STATE OF IDAHO,

Respondent.

On February 25, 2015, Jimmy Leytham, filed a Petition *pro se*¹ and requested the Court appoint counsel. The Court granted his request that same date. The Court held a status conference and at Leytham's request continued the status conference to allow him to file a Rule 35 in the underlying cases. The Court stayed proceedings pending the Rule 35 decision. His new counsel filed the Rule 35, and the Court denied his Rule 35.

At the continued hearing, his counsel requested more time and the Court rescheduled the scheduling conference again to June 17, 2015.

Leytham moved for discovery, more specifically allowing him to take depositions of his trial counsel which the Court denied.

Leytham did not amend his Petition. The State answered and moved for summary dismissal on June 17, 2015. On August 24, 2015, Leytham replied to the State's motion.

The Court takes judicial notice of the following documents from the underlying criminal action, Case Nos. CR-FE-2014-3478/CR-FE-2014-5269: Guilty Plea Advisory Form completed by Leytham, presentence report (including I.C. § 19-2522 evaluation), Clerk Minutes dated November

¹ "Pro se litigants are held to the same standards and rules as those represented by an attorney." *Twin Falls Cnty. v. Coates*, 139 Idaho 442, 445, 80 P.3d 1043, 1046 (2003). *Pro se* litigants are not accorded any special consideration simply because they are representing themselves and are not excused from adhering to procedural rules. *Nelson v. Nelson*, 144 Idaho 710, 170 P.3d 375, 383 (2007); *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997); *Golay v. Loomis*, 118 Idaho 387, 392, 797 P.2d 95, 100 (1990), quoting *Golden Condor, Inc. v. Bell*, 112 Idaho 1086, 1089 n.5, 739 P.2d 385, 388 n.5 (1987).

12, 2014, Case Nos. CR-FE-2014-5269, transcripts dated September 10, 2014 (guilty plea) and December 31, 2014 (sentencing).

Based on the following, the Court grants the State's motion and dismisses Leytham's Petition.

BACKGROUND

Leytham pled guilty to the two cases on September 10, 2014, pursuant to a plea agreement where the State agreed to not charge him as a persistent violator and agreed to dismiss several charges. The State was free to ask for a prison sentence for up to ten years. Leytham agreed to pay all restitution even on the dismissed charges and on DR#2014-411861.² The State also indicated it was investigating other similar cases.

Before entering the plea, Leytham completed the Court's³ written guilty plea form. Leytham testified that he reads and understands English and that he actually reviewed the form and agreed with the circled answers. He also testified that it was his signature on the front and back of the form and he had initialed the statement of rights. Finally he testified that the answers were true and correct.

He also testified that he had reviewed all of that evidence, that he understood that by pleading guilty he was admitting the truth of all the allegations. Leytham also testified that there was nothing that he had asked his attorney to do that he had not done and that he was waiving all defenses, both factual and legal. Leytham testified that he understood that the Court could impose up to nineteen (19) years without possibility of parole and that the Court was not bound by any recommendation made by either his trial counsel or the State.

Among other things during the plea hearing, Leytham also agreed that he had had enough time with his attorney, had fully discussed all the facts and circumstances of the charge, and that he was satisfied with his attorney's services. Leytham also agreed that he admitted to the truth of the charge as stated in the Count I and that he was guilty of the acts and conduct charged. He also answered the subsequent questions in the written guilty plea form as follows:

² This investigation involved his defrauding Washington Federal Savings and is the restitution imposed in Case No. CR-FE-2014-3478.

³ It was actually the Honorable Judge Hippler's form.

10. There are two types of plea agreements. Please initial the ONE paragraph below which describes the type of plea you are entering. **DO NOT INITIAL BOTH PARAGRAPHS:**

a. I understand that the court is **NOT** bound by the plea agreement or any sentencing recommendations, and may impose any sentence authorized by law, including the maximum sentence stated above. Because the court is not bound by the agreement, if the district court chooses not to follow the agreement, I will not have the right to withdraw my guilty plea. JL⁴

14. Is there anything you have requested your attorney to do that has **not** been done?
Yes ☐ No ☒

21. Do you understand that by pleading guilty you waive any defenses, both factual and legal, that you believe you may have in this case? Yes ☒ No ☐

22. Are there any motions or other requests for relief that you believe should still be filed in this case? Yes ☐ No ☒

If you answered "yes," what motions or requests? _____

23. Do you understand that when you plead guilty, you are admitting the truth of each and every allegation contained in the charge(s) to which you plead guilty?

Yes ☒ No ☐

40. Do you understand that *no one*, **including your attorney**, can force you to plead guilty in this case? Yes ☒ No ☐

41. Are you pleading guilty freely and voluntarily? Yes ☒ No ☐

42. Are you pleading guilty because you committed the acts alleged in the information or indictment? Yes ☒ No ☐

44. Has ***any*** person (including a law enforcement officer or police office) threatened you or done anything to make you enter this plea against your will?

Yes ☐ No ☒

If your answer is "yes," what threats have been made and by whom?

45. **Other than in the plea agreement**, has any person promised you that you will receive any special sentence, reward, favorable treatment, or leniency with regard to the plea you are about to enter? Yes ☐ No ☒

⁴ This was in Leytham's handwriting.

1 If your answer is "yes," what promises have been made and by whom?

2 46. Do you understand that the only person who can promise what sentence you will
3 actually receive is the Judge? Yes ☒ No ☐

4 Has the Judge made any promises to you? Yes ☐ No ☒

5 47. Are you satisfied with your attorney? Yes ☒ No ☐

6 48. Have you answered all questions on this Questionnaire truthfully and of your own free
7 will? Yes ☒ No ☐

8 49. Have you had any trouble answering any of the questions in this form which you could
9 not work out by discussing the issue with your attorney? Yes ☐ No ☒

10 50. IF YOU ARE NOT A CITIZEN OF THE UNITED STATES, do you understand that
11 by pleading guilty you are presumptively deportable, meaning that you will be removed
12 from the United States and returned to your country of origin, and lose your ability to
13 obtain legal status in the United States, or be denied an application for United States
14 citizenship? YES NO N/A

15 51. Do you swear under penalty of perjury that your answers to these questions are
16 true and correct? Yes ☒ No ☐

17 (Emphasis in the original.) At the end of the form he affirmed the truth of his questionnaire as
18 follows by signing the bottom of the form:

19 I have answered the questions on pages 1-8 of this Guilty Plea Advisory form
20 truthfully. I understand all of the questions and answers herein, have discussed each
21 question and answer with my attorney, and have completed this form freely and
22 voluntarily. Furthermore, no one has threatened me to do so.

23 Leytham signed the form and dated it on September 10, 2014. Before accepting his plea, the Court
24 engaged in the following colloquy with Leytham regarding the crimes:

25 DIRECT EXAMINATION

26 Q. All right. And now I understand you filled out some of this guilty plea form
in your own handwriting; is that right?

A. Yes, I did, Your Honor. I think he already circled about three squares and I
did everything else.

Q. Okay. So just the ones that he circled; is that right?

A. Yes, Your Honor.

Q. Okay. Well, I'm -- I'm going to go through this to make this these are your
answers.

Now, that's your signature I see on the front and back; is that right?

1 A. Yes, ma'am.

2 Q. And when we talk about the statement of rights, I see what looks like initials
3 with a J and an L Are those your initials?

4 A. Yes, they are.

5 Q. And did you read those paragraphs before you initialed them?

6 A. Yes, ma'am.

7 Q. And so those are not your attorney's initials?

8 A. No, ma'am.

9 Q. Did you have any trouble understanding what those portions of the guilty
10 plea form meant?

11 A. No, ma'am.

12 Q. Now, you've indicated that you've been taking a pill for depression as well
13 as some other medications and some Hydrocodone for your neck pain; is that
14 correct?

15 A. Yes, Your Honor.

16 Q. Are you having any difficulty understanding these proceedings?

17 A. No, ma'am.

18 Q. And you have been taking all of these medications for some time, about 45
19 days you said?

20 A. Just take depression for 45. The rest of them I've been taking since 2005.

21 Q. Okay. Normally by this time in any of these medications any effects have
22 stabilized. But I just want to make sure are you having any sleepiness or any
23 difficulty understanding what we're talking about here today?

24 A. No, Your Honor.

25 Q. And do you feel that these medications prevented you from knowingly and
26 voluntarily deciding to plead guilty?

A. No, Your Honor.

Q. Did they make you more susceptible to Mr. Blender's suggestions?

A. Yes, Your Honor.

Q. They did? So your -- Mr. Blender's suggestion -- these medications made
you more susceptible to those?

A. No, ma'am. I'm sorry. I misunderstood you.

Q. You misunderstood my question?

A. Yes, ma'am.

1 Q. Okay. And so these are your decisions, not Mr. Blender's decisions?

2 A. Yes, ma'am.

3 Q. And, again, just for the record, his answers seem appropriate to me, his
4 affect is appropriate. We've got great eye contact. He's not slurring his words. He
5 doesn't appear sleepy. His answers do not seem inappropriate to me. Is there
6 anyone here who would disagree with that?

7 MS. DUNN: No, Your Honor.

8 THE COURT: Mr. Blender?

9 MR. BLENDER: No, Your Honor. I agree with what he said.

10 THE COURT: Mr. Leytham?

11 THE DEFENDANT: I agree with what you said, ma'am.

12 THE COURT: Great.

13 Q. BY THE COURT: Now, a couple more questions. You're under the care of Dr.
14 Fred Rice; is that right?

15 A. Yes, I am. He is one of my clients plus he's also a psychologist and I talk to
16 him once in a while.

17 Q. Well, who is prescribing the depression medication?

18 A. That would be my doctor, Dr. Fox, Michael Fox out of Kuna Advanced
19 Care.

20 Q. Okay. So you've been seeing these people for some time?

21 A. Yes, ma'am.

22 Q. What was the diagnosis that you got? You said you were diagnosed in 1979.
23 Tell me what that was.

24 A. I'm a schizophrenic and a split personality, ma'am.

25 Q. Okay. So what are you taking for schizophrenia?⁵

26 A. Nothing. I grew out of that within years.

Q. Okay. Is there anything else that you think might affect your ability to
understand the questions or make a decision in this case?

A. No, ma'am.

Q. Now, you understand I'm not required to follow this plea agreement?

⁵ The Court ordered an I.C. § 19-2522 evaluation and the psychologist diagnosed him with Dysthymic Disorder with a provisional diagnosis of Generalized Anxiety Disorder. He also diagnosed him with a Personality Disorder and Borderline Intellectual functioning. Nothing in the evaluation suggested he was not competent.

1 A. Yes, ma'am, I understand.

2 Q. What that means is I can actually give you a 14-year prison sentence in the
3 forgery case and a five-year prison sentence in the financial transaction card case
4 and I can run them consecutive to each other for a total of 19 years without the
5 possibility of parole. Do you understand that?

6 A. Yes, ma'am.

7 Q. *And I'm not required to follow recommendations of either counsel. Do you*
8 *understand that?*

9 A. Yes, ma'am.

10 Q. Now, you understand that you're agreeing to pay restitution in all of these
11 cases including the dismissed cases. Do you understand that?

12 A. Yes, ma'am.

13 Q. And you're also agreeing to pay restitution in the case that's the DR case, 20
14 14-41 1861. Do you understand that?

15 A. Which one would that be, ma'am?

16 Q. That's the one that -- it's the one that they're not going to file on.

17 A. Yes.

18 Q. *All right. And you understand again that because these are two crimes that I*
19 *can run them consecutive to each other?*

20 A. Yes, ma'am.

21 Q. *You also understand that if I don't follow this plea agreement, you will not*
22 *be allowed to withdraw your guilty plea? Do you understand that?*

23 A. I understand.

24 Q. *You understand the only person who can make any promises to you as to*
25 *what's going to happen at sentencing is me?*

26 A. Yes, ma'am.

Q. *Have I made you any promises?*

A. No, ma'am.

Q. *Have you reviewed the evidence that was provided to your attorney*
provided during discovery?

A. Yes, I have.

Q. Is there anything that your attorney has -- that you've asked your attorney to
do that he has not done?

A. No, ma'am.

1 Q. And have you told your attorney everything that you know about these crimes?

2 A. Yes, ma'am.

3 Q. Have you had enough time to talk to your attorney?

4 A. Yes, ma'am.

5 O. Are there witnesses who can demonstrate you are innocent of this crime?

6 A. No, ma'am.

7 Q. Now, you said — you answered no and then underneath it says if you answered yes, have you told your attorney who those witnesses are and you said yes. But there aren't any witnesses, are there, who could show you were innocent?

8 A. No, ma'am.

9 Q. Now, you understand that because this is an unconditional guilty plea, you would not be able to challenge any rulings that came before the guilty plea including any search or seizures that occurred in this case or any issues about the manner of arrest or any statements that you made? Do you understand that?

10 A. Yes, ma'am.

11 Q. Now, you've indicated that you've waived your right to appeal the judgment as part of your plea agreement and my understanding of the plea agreement you are not waiving that. Do you understand that?

12 A. Yes, ma'am.

13 Q. So you can still — if you don't like my sentence, you can appeal that. Do you understand that?

14 A. Yeah.

15 Q. Okay?

16 A. Yes, ma'am.

17 Q. Are there any promises that have been made to you that influenced your decision to plead guilty —

18 A. No, ma'am.

19 Q. -- besides the plea agreement?

20 A. No.

21 O. Do you understand that when you plead guilty, you waive -- you give up all of your defenses including factual and legal defenses? Do you understand that?

22 A. Yes, ma'am.

23 Q. Are there any motions that you think your attorney should have filed?

24 A. No, ma'am.

1 Q. Do you understand that when you plead guilty, you're admitting the truth of
each and every allegation to those charges to which you plead guilty?

2 A. Yes, ma'am.

3 (Emphasis added.) The Court accepted his plea as knowingly and voluntarily given and set the
4 case for sentencing. The Court set sentencing for November 12, 2014.

5 On November 12, 2014, Leytham and his trial counsel, Mr. Neville, appeared. At this point
6 the Court and counsel had read the presentence report where Leytham attempts to minimize his
7 involvement in these crimes and claim innocence. The Court, Mr. Neville and Leytham discussed
8 his new claim. Mr. Neville requested the Court order an evaluation pursuant to I.C. § 19-2522,
9 which the Court did. The Court also rescheduled his sentencing. *see* Clerk Minutes dated
10 November 12, 2014, Case Nos. CR-FE-2014-5269. The Court asked Leytham whether he
committed the crimes and he indicated that he did and volunteered to the Court that he was not
11 coerced and that there was no evidence of any kind that anyone forced him to plead guilty. *Id.*

12 On December 31, 2014, the Court sentenced Jimmy D. Leytham in CR-FE-2014-3478 on
13 Count II., Forgery, Felony, I.C. § 18-3601, to an aggregate term of ten (10) years, with a minimum
14 period of confinement of five (5) years, followed by a subsequent indeterminate period of custody
15 not to exceed five (5) years. The State dismissed Counts I and III, Forgery, as part of a plea
agreement and the Court ordered restitution in the amount of \$55,331.92.

16 That same date, the Court sentenced Jimmy D. Leytham in CR-FE-2014-5269 on Count II,
17 Criminal Possession of a Financial Transaction Card, Felony, I.C. § 18-3125 to an aggregate term
18 of five (5) years, with a minimum period of confinement of zero (0) years, followed by a
19 subsequent indeterminate period of custody not to exceed five (5) years. The State dismissed
20 Count I, Grand Theft, Felony, I.C. § 18-2403(2)(c) and agreed to not have him charged a persistent
21 violator. The Court ordered that this case run consecutively to CR-FE-2014-3478.⁶ The Court
further ordered restitution in the amount of \$202.75.

22 Leytham's post-conviction counsel, Lance Fuisting, timely filed a Motion for
23 Reconsideration of Sentence pursuant to Rule 35, I.C.R., on April 28, 2015. Leytham appealed.
24 That appeal is pending.

25 ⁶ Leytham is technically only pursuing post-conviction relief in case number CR-FE-2014-0003478.

1 This was at least Leytham's 8th felony conviction which included Burglary (1978⁷, 1979),
2 Issuing a Check Without Funds (1978), Disposing of Stolen Property (1979), Escape from a
3 Penitentiary (1979), and Grand Theft (1982). While the Court recognized that his last criminal
4 felony conviction was in 1982, in this case, CR-FE-2014-3478, the victim, a very elderly man,
5 hired Leytham as a handyman over several years. The evidence established that Leytham
6 repeatedly altered the checks written to him. For example, he altered a check from \$25 to \$2500,
7 another from \$96.50 to \$960.50, and another from \$400 to \$2400. Evidence was presented at
8 sentencing that Leytham had even accompanied the victim to the bank and tried to get him to
9 withdraw \$10,000 and the teller, being suspicious, would only allow the elderly man to withdraw
10 \$5,000.

11 In CR-FE-2014-5269, he stole a woman's purse in a Walmart and then was caught trying to
12 withdraw \$300 from her ATM. At sentencing, he claimed he "found" her purse and was trying to
13 simply "deposit" the credit card in the ATM. However, he is actually seen on video stealing her
14 purse and seen trying to withdraw \$300. While awaiting sentencing the State received more reports
15 of potential stealing from another elderly man for whom he worked as a handyman.

16 This post-conviction petition followed.

17 ANALYSIS

18 A post-conviction petition under the Uniform Post-Conviction Procedure Act is a civil
19 proceeding governed by the Idaho Rules of Civil Procedure. *Pizzuto v. State*, 146 Idaho 720, 724,
20 202 P.3d 642, 646 (2008). A petitioner must prove by a preponderance of evidence the allegations
21 upon which the request for post-conviction relief is based. *Hauschulz v. State*, 144 Idaho 834, 838,
22 172 P.3d 1109, 1113 (2007); I.C.R. 57(c). Furthermore, *admissible* evidence supporting the
23 applicant's allegations must accompany the post-conviction petition, otherwise the application is
24 subject to dismissal. *Adams v. State*, 158 Idaho 530, ___, 348 P.3d 145, 150-51 (2015); *State v.*
25 *Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (citing I.C. § 19-4903). In fact, a petition for
26 post-conviction relief must be verified with respect to facts within the personal knowledge of the
petitioner, and *affidavits, records, or other evidence supporting its allegations must be attached* or
the petition must state why such supporting evidence is not included with the petition. *Heilman v.*

⁷ Amended from Embezzlement.

1 *State*, 158 Idaho 139, ___, 344 P.3d 919, 924 (Ct. App. 2015); I.C. § 19-4903. In other words, the
2 petition must present or be accompanied by admissible evidence supporting its allegations or the
3 petition will be subject to dismissal. *Id.* citing *Wolf v. State*, 152 Idaho 64, 67, 266 P.3d 1169,
4 1172 (Ct. App. 2011). Leytham's Petition and supporting affidavits do not comply with this
requirement.

5 The State moved for summary dismissal and Leytham opposed, requesting an evidentiary
6 hearing. I.C. § 19-4906.⁸ Leytham claims ineffective assistance of counsel and generally claimed
as follows:

- 7 1. Trial counsel failed to investigate his medical issues;
- 8 2. Trial counsel failed to adequately advise him on all matters necessary to enter an
9 informed guilty plea;
- 10 3. Trial counsel and Leytham's relationship broke down;
- 11 4. Trial counsel failed to inform Leytham of his rights and responsibilities under the
12 plea deal prior to entry of plea and misled him as what the court would do.

13 Leytham also claims, without any evidence to support his claims, that his medications impaired his
14 ability to enter an informed guilty plea.

15 The Court finds he failed to present sufficient evidence to raise a genuine issue of material
16 fact as to whether his representation was ineffective.

17 When considering summary dismissal, the Court must construe disputed facts in the
18 petitioner's favor, but the court is not required to accept either the petitioner's mere conclusory
19 allegations or factual assertions, unsupported by admissible evidence, or the petitioner's
20 conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct.App.1994); *Baruth*
21 *v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App.1986). Moreover, the Court, as the
22 trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for
summary disposition; rather, the Court is free to arrive at the most probable inferences to be drawn
from uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714
(Ct.App.2008).

23
24 ⁸ Idaho Code Section 19-4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to
25 a motion by a party or upon the court's own initiative, if it appears from the pleadings, depositions, answers to
interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine
issue of material fact and the moving party is entitled to judgment as a matter of law.

1 Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by
2 the record of the criminal proceedings, if the petitioner has not presented evidence making a prima
3 facie case as to each essential element of the claims, or if the petitioner's allegations do not justify
4 relief as a matter of law. *Keserovic v. State*, ___ Idaho ___, 345 P.3d 1024, 1028-29 (Ct. App. 2015);
5 *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); *DeRushé v. State*, 146 Idaho 599,
6 603, 200 P.3d 1148, 1152 (2009). If the petition, affidavits, and other evidence supporting the
7 petition allege facts that, if true, would entitle the petitioner to relief, the post-conviction claim
8 may not be summarily dismissed. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111
9 (2004); *Sheahan v. State*, 146 Idaho 101, 104, 190 P.3d 920, 923 (Ct. App. 2008). Only where a
10 genuine issue of material fact exists must the Court hold an evidentiary hearing to resolve the
11 factual issues. *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. The Court finds that neither party
12 demonstrated a genuine issue of material fact exists. Therefore, the Court denies Leytham's
13 request for an evidentiary hearing.

14 At its core, Leytham's claim for post-conviction relief is a claim for ineffective counsel. He
15 also claims that his guilty plea was coerced.

16 **A. Ineffective assistance of counsel standards.**

17 There are two general categories of ineffective assistance of counsel and each is governed
18 by a different standard. While he is not explicit, a close reading of his claims shows that Leytham
19 makes claims under both. The first type is sometimes referred to as "actual ineffective assistance
20 of counsel" and is based on specific actions or omissions by counsel that resulted in prejudice to
21 the defendant. This is the more common ineffective assistance of counsel claim and the standard
22 applied to such claim is generally set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

23 The second category is often referred to as *per se* ineffective assistance of counsel or a
24 *Cronic* claim. See *U.S. v. Cronic*, 466 U.S. 648, 662 (1984). *Cronic* only applies to circumstances
25 in which the defendant was actually or constructively denied the assistance of counsel and in such
26 cases, prejudice to the defendant is presumed and need not be established in order to be entitled to
relief.

Leytham casts most of his ineffective assistance of counsel claims as *Strickland* claims.

1. *Strickland* claims.

In order to succeed on a claim of "actual ineffective assistance of counsel," Leytham must

1 meet the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *Mitchell v.*
2 *State*, 132 Idaho 274, 277, 971 P.2d 727, 730 (1998). To prevail on this claim, Leytham must
3 demonstrate (1) counsel's *performance* fell below an objective standard of reasonableness, and (2)
4 there is a reasonable probability that, but for counsel's errors, the result would have been different.
5 *Strickland*, 466 U.S. at 687-88, 692; *Mitchell*, 132 Idaho at 277, 971 P.2d at 730. While parties
6 often focus on the first prong, critically examining every decision made by trial counsel, they
7 virtually ignore the more important *Strickland* requirement -- prejudice. Even those decisions that
8 result from "inadequate preparation, ignorance of the relevant law or other shortcomings" do not
9 constitute ineffective assistance of counsel absent clear prejudice.

10 When evaluating an ineffective assistance of counsel claim, a court does not second-guess
11 strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction
12 relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the
13 relevant law or other shortcomings capable of objective review. *Pratt v. State*, 134 Idaho 581, 584,
14 6 P.3d 831, 834 (2000). "There is a strong presumption that counsel's performance fell within the
15 wide range of professional assistance." *State v. Hairston*, 133 Idaho 496, 511, 988 P.2d 1170, 1185
16 (1999) (internal quotations omitted) (quoting *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174,
17 1176 (1988)). "To establish prejudice, the applicant must show a reasonable probability that, but
18 for the attorney's deficient performance, the outcome of the trial would have been different."
19 *Gilpin-Grubb v. State*, 138 Idaho 76, 81, 57 P.3d 787, 792 (2002) (quoting *Jakoski v. State*, 136
20 Idaho 280, 282, 32 P.3d 672, 674 (Ct. App. 2001)).

21 "‘Surmounting *Strickland*’s high bar is never an easy task.’ *Padilla v. Kentucky*,
22 559 U.S. ----, ---- [130 S.Ct. 1473, 1485, 176 L.Ed.2d 284] (2010). An ineffective-
23 assistance claim can function as a way to escape rules of waiver and forfeiture and
24 raise issues not presented at trial [or in pretrial proceedings], and so the *Strickland*
25 standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’
26 threaten the integrity of the very adversary process the right to counsel is meant to
serve. *Strickland*, 466 U.S., at 689-690 [104 S.Ct. 2052]. Even under *de novo*
review, the standard for judging counsel's representation is a most deferential one.
Unlike a later reviewing court, the attorney observed the relevant proceedings,
knew of materials outside the record, and interacted with the client, with opposing
counsel, and with the judge. It is ‘all too tempting’ to ‘second-guess counsel’s
assistance after conviction or adverse sentence.’ *Id.*, at 689 [104 S.Ct. 2052]; *see*
also Bell v. Cone, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002);
Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

1 The question is whether an attorney's representation amounted to incompetence
2 under 'prevailing professional norms,' not whether it deviated from best practices
3 or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

4 *Premo v. Moore*, 131 S.Ct. 733, 739-40 (2011). Likewise, in another recent United States Supreme
5 Court case, the Supreme Court emphasized again how deferential a reviewing court should be to
6 trial counsel because:

7 An ineffective-assistance claim can function as a way to escape rules of waiver and
8 forfeiture and raise issues not presented at trial, and so the *Strickland* standard must
9 be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the
10 integrity of the very adversary process the right to counsel is meant to serve.
11 *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the
12 standard for judging counsel's representation is a most deferential one. Unlike a
13 later reviewing court, the attorney observed the relevant proceedings, knew of
14 materials outside the record, and interacted with the client, with opposing counsel,
15 and with the judge. It is "all too tempting" to "second-guess counsel's assistance
16 after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v.*
17 *Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v.*
18 *Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question
19 is whether an attorney's representation amounted to incompetence under
20 "prevailing professional norms," not whether it deviated from best practices or most
21 common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

22 *Harrington v. Richter*, 131 S.Ct. 770, 787 -788 (2011).

23 In other words, it is not enough for Leytham to simply show that his attorney's errors had
24 some conceivable effect on his case because virtually every act or omission of counsel would meet
25 that test; he must show the outcome would have been different. *Strickland*, 466 U.S. at 693. "The
26 likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*,
131 S.Ct. at 792 (citing *Strickland*, 466 U.S. at 693); *see also Cullen v. Pinholster*, 131 S.Ct. 1388,
1403 (2011) ("highly deferential" look at counsel's performance). It is not sufficient for counsel on
post-conviction to merely argue that trial counsel conducted the trial or other proceedings
differently than post-conviction counsel would have done. It is not even good enough to point out
that trial counsel committed a mistake in the law or the facts. Instead, post-conviction counsel
must establish that trial counsel's representation fell below an objective standard of
reasonableness, the defendant was prejudiced, and that the outcome of the trial would have been
different but for the deficient performance.

Even if that is established, Leytham must still prove by a preponderance of the evidence "a

1 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
2 would have been different." *Estrada v. State*, 143 Idaho 558, 565, 149 P.3d 833, 840 (2006)
3 (quoting *Strickland*, 466 U.S. at 694). "[R]easonable probability is a probability sufficient to
4 undermine confidence in the outcome." *Id.* As the United States Supreme Court wrote in
5 *Strickland*: "[i]n making this determination [referring to the prejudice prong], a court hearing an
6 ineffectiveness claim must consider the totality of the evidence before the judge or jury." 466 U.S.
7 at 696. The United States Supreme Court in *Strickland* carefully analyzed the prejudice required in
8 order to support a finding of ineffective assistance of counsel as follows:

9 An error by counsel, even if professionally unreasonable, does **not** warrant setting
10 aside the judgment of a criminal proceeding if the error had no effect on the
11 judgment. *Cf. United States v. Morrison*, 449 U.S. 361, 364-365, 101 S.Ct. 665,
12 667-668, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee
13 of counsel is to ensure that a defendant has the assistance necessary to justify
14 reliance on the outcome of the proceeding. Accordingly, any deficiencies in
15 counsel's performance must be prejudicial to the defense in order to constitute
16 ineffective assistance under the Constitution.

17 ***

18 It is not enough for the defendant to show that the errors had some conceivable
19 effect on the outcome of the proceeding. Virtually every act or omission of counsel
20 would meet that test, *cf. United States v. Valenzuela-Bernal*, 458 U.S. 858, 866-
21 867, 102 S.Ct. 3440, 3446-3447, 73 L.Ed.2d 1193 (1982), and not every error that
22 conceivably could have influenced the outcome undermines the reliability of the
23 result of the proceeding. Respondent suggests requiring a showing that the errors
24 "impaired the presentation of the defense." Brief for Respondent 58. That standard,
25 however, provides no workable principle. Since any error, if it is indeed an error,
26 "impairs" the presentation of the defense, the proposed standard is inadequate
because it provides no way of deciding what impairments are sufficiently serious to
warrant setting aside the outcome of the proceeding.

19 *Strickland*, 466 U.S. at 691-93 (emphasis added).

20 In fact, the prejudice component is so significant that a court is not required to even
21 analyze whether a trial counsel's performance was deficient before examining the prejudice aspect.
22 In addressing the prejudice component of an ineffective assistance of counsel claim, the United
23 States Supreme Court made the following observation:

24 Although we have discussed the performance component of an ineffectiveness
25 claim prior to the prejudice component, there is no reason for a court deciding an
26 ineffective assistance claim to approach the inquiry in the same order or even to
address both components of the inquiry if the defendant makes an insufficient

1 showing on one. In particular, a court need not determine whether counsel's
2 performance was deficient before examining the prejudice suffered by the
3 defendant as a result of the alleged deficiencies. The object of an ineffectiveness
4 claim is not to grade counsel's performance. If it is easier to dispose of an
5 ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect
6 will often be so, that course should be followed. Courts should strive to ensure that
7 ineffectiveness claims not become so burdensome to defense counsel that the entire
8 criminal justice system suffers as a result.

9 *Strickland*, 466 U.S. at 697 (emphasis added). Throughout Leytham's post-conviction argument, he
10 focuses on his trial counsel's performance substituting his judgment on strategic decisions and
11 virtually disregards whether any of their strategic decisions prejudiced his case.

12 As the United States Supreme Court observed, judicial scrutiny of trial counsel's
13 performance must be highly deferential because it is too easy for a court examining trial counsel's
14 defense after that defense has proven to be unsuccessful to conclude that a particular act or
15 omission was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, (1982).

16 Thus, a court deciding an actual ineffectiveness claim must judge the
17 reasonableness of counsel's challenged conduct on the facts of the particular case,
18 viewed as of the time of counsel's conduct. A convicted defendant making a claim
19 of ineffective assistance must identify the acts or omissions of counsel that are
20 alleged not to have been the result of reasonable professional judgment. The court
21 must then determine whether, in light of all the circumstances, the identified acts or
22 omissions were outside the wide range of professionally competent assistance. In
23 making that determination, the court should keep in mind that counsel's function,
24 as elaborated in prevailing professional norms, is to make the adversarial testing
25 process work in the particular case. At the same time, the court should recognize
26 that counsel is strongly presumed to have rendered adequate assistance and made
all significant decisions in the exercise of reasonable professional judgment.

These standards require no special amplification in order to define counsel's duty to
investigate, the duty at issue in this case. As the Court of Appeals concluded,
strategic choices made after thorough investigation of law and facts relevant to
plausible options are virtually unchallengeable; and strategic choices made after
less than complete investigation are reasonable precisely to the extent that
reasonable professional judgments support the limitations on investigation. In other
words, counsel has a duty to make reasonable investigations or to make a
reasonable decision that makes particular investigations unnecessary. In any
ineffectiveness case, a particular decision not to investigate must be directly
assessed for reasonableness in all the circumstances, applying a heavy measure of
deference to counsel's judgments.

Strickland, 466 U.S. at 690-691 (emphasis added).

2. Cronic claims.

In contrast, *Cronic* was a companion case to *Strickland*. While the *Strickland* standard is appropriate for the overwhelming majority of his ineffective assistance of counsel claims, *Cronic* recognized that in rare circumstances counsel's conduct may be so bad that it is *per se* ineffective. Here, Leytham claims that the relationship between his trial counsel and him broke down to the point he failed to subject the case to meaningful adversarial testing. This is a *Cronic* claim. In *Cronic*, the Supreme Court reasoned that, "absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 662. The circumstances in which prejudice could be presumed are limited. Those circumstances include:

[M]ost obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

Id. at 659. In summary, *Cronic* delineated three limited circumstances to which the *per se* rule would apply: (1) state or court actions, (2) failure to subject the case to meaningful adversarial testing, and (3) conflict of interest.

If state actions result in an actual or constructive denial of assistance of counsel, prejudice may be presumed. Leytham does not allege that any state actions or court actions caused an actual or constructive denial of assistance of counsel. Examples encompassed by *Cronic* include denial of counsel at a critical stage of the case⁹ or appointing new counsel a day before trial in a high profile capital murder case.¹⁰

B. Leytham's ineffective assistance of counsel claims fail.

1. The Court dismisses Leytham's failure to investigate claim.

Leytham claimed that his trial counsel was ineffective for failing to investigate his alleged medical condition and obtain medical records. However, he does not explain how it would have

⁹ Where a defendant was prohibited by the court from consulting with his attorney during an overnight recess of the trial, the Supreme Court found prejudice was presumed. *See Geders v. U.S.*, 425 U.S. 80 (1976).

¹⁰ *See e.g., Powell v. Alabama*, 287 U.S. 45 (1932). However, the mere tardy appointment of counsel does not automatically require reversal of every conviction. *Chambers v. Maroney*, 399 U.S. 42 (1970).

1 changed the Court's sentence. *Sparks v. State*, 140 Idaho 292, 92 P.3d 542 (Ct. App. 2004) (citing
2 *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)).

3 Moreover, the record also belies his complaint. According to the record, the Court
4 discussed the adequacy of the investigation during the plea hearing, inquiring in part, as follows:

5 Q: Have you reviewed the evidence that was provided to your attorney
6 provided [sic] during discovery?

7 A: Yes, I have.

8 Q: Is there anything that your attorney has — that you've asked your attorney to
9 do that he has not done?

10 A: No, ma'am.

11 Q: And have you told your attorney everything that you know about these
12 crimes?

13 A: Yes, ma'am

14 Q: Have you had enough time to talk to your attorney?

15 A: Yes, ma'am.

16 Q: Are there witnesses who can demonstrate you are innocent of this crime?

17 A: No, ma'am.

18 (Tr., pg. 24, ln.17 to pg. 25, ln.8.) Furthermore, while he quotes from a part of the record, the
19 transcript is taken out of context. The Court was merely observing that there was no basis for his
20 present claims at sentencing that he was suffering from some major illness like Lupus. It was not
21 critical to sentencing and was collateral at best.

22 Finally, Leytham in fact presented all of his medical records to the Court in support of his
23 Rule 35 and the Court denied his motion *even in the face of these medical records*. Therefore, he
24 cannot prove any alleged failure prejudiced him or affected the outcome.

25 This claim fails and the Court dismisses it.

26 2. The Court dismisses Leytham's claim that trial counsel failed to adequately advise
him with regard to entering a guilty plea.

Leytham generally claims his guilty plea was not entered voluntarily and knowingly. He
supports this allegation by claiming his trial counsel misrepresented what the Court would do at
sentencing. He also claims trial counsel failed to advise him about his appellate rights. Finally he
claims his guilty plea was not knowing and voluntary because he did not understand the restitution
he agreed to pay.

1 a. *Allegation that he was misled as to his sentence does not support post-*
2 *conviction relief.*

3 Leytham claims he pled guilty because counsel assured him he would receive probation;
4 however, the record demonstrates that Leytham pled guilty knowing that probation was not
5 guaranteed and that he was facing a potential nineteen (19) year sentence without possibility of
6 parole. Leytham was present when the Court inquired of the State whether the State could argue
7 for imposition, saying, "you can argue for imposition[?]" (Tr., pg. 6, lns. 13-15.) To which the
8 State replied, "Yes, Your Honor." (Tr., pg. 6, ln. 15.) The Court explained the plea was not
9 binding directly with Leytham. The following exchange occurred:

10 Q: What that means is that I can actually give you a 14-year prison sentence in
11 the forgery case and a five-year prison sentence in the financial transaction card
12 case and I can run them consecutive to each other for a total of 19 years without the
13 possibility of parole. Do you understand that?

14 A: Yes, ma'am.

15 Q: And I'm not required to follow recommendations of either counsel. Do you
16 understand that?

17 A: Yes ma'am.

18 (Tr., pg. 23, lns. 3-14). Clearly, Leytham knew that that there was the possibility of a prison
19 sentence.

20 This is significant because, even assuming that his trial counsel failed to adequately explain
21 the potential sentence,¹¹ the Court's careful colloquy with him, plus the guilty plea form he filled
22 out under oath, establishes that he knew a prison sentence was possible. As the Idaho Supreme
23 Court recently ruled, where the Court adequately informs a defendant and the record conclusively
24 proves he was informed properly by the Court, a petitioner cannot establish that the outcome
25 would have changed but for his attorney's ineffectiveness. *Murray v. State*, 156 Idaho 159, 167-68,
26 321 P.3d 709, 717-18 (2014). Here the record clearly proves Leytham understood the Court was
27 free to impose the sentence it did.

28 Applying the Idaho Supreme Court's decision in *Booth*, Leytham has also failed to
29 demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have

30 ¹¹ For the purposes of this decision the Court has assumed Leytham's factual assertion to be true, thus making an
31 evidentiary hearing unnecessary.

1 pleaded guilty and would have insisted on going to trial.” *Booth v. State*, 151 Idaho 612, 621, 262
2 P.3d 255, 264 (2011) (quoting *Ridgley v. State*, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010)).

3 Thus, the Court dismisses this claim.

4 b. *Allegation that his trial counsel failed to advise him about his appellate rights
5 does not support post-conviction relief.*

6 Leytham complains that his trial counsel failed to advise him about his appeal rights.
7 However, like the previous claim, the record clearly establishes that the Court in fact advised him
8 both in writing and verbally that he had a right to appeal and that it must be filed within forty-two
9 (42) days. The Court stated at the end of sentencing as follows:

10 Now, you have the right to appeal my decision. If you wish to appeal, you have to
11 do so within 42 days of the date judgment is made and filed. In making that appeal
12 you may be represented by an attorney. And if you cannot afford one, one will be
13 appointed to represent you at public expense.

14 (Tr., pg. 64, lns. 14-20). Likewise, the Court’s judgments clearly set forth Leytham’s appeal rights.
15 While the failure to advise a defendant of his appeal rights would fall below an objective standard
16 of reasonableness, Leytham cannot show that it prejudiced him because this Court unmistakably
17 did advise him. *Murray*, 156 Idaho at 167-68, 321 P.3d at 717-18.

18 Therefore, even assuming his claim to be true, like the previous claim, the Court dismisses
19 it.

20 c. *Allegation that his trial counsel failed to advise him about the amount of
21 restitution does not support post-conviction relief.*

22 Leytham now claims that his trial counsel was ineffective because he did not adequately
23 advise him about the potential restitution. However, the plea agreement expressly included
24 restitution as a condition of the plea agreement, even on the dismissed charges and on DR# 2014-
25 411861.¹² Both the Court and the State placed the restitution requirement on the record. (Tr., pg. 4,
26 lns. 10-15.). The Court specifically clarified that as part of the plea agreement Leytham agreed to
pay restitution on all of the dismissed charges, restitution on case DR-20 14-41181, with such
restitution being subject to a civil judgment. (Tr., pg. 4, ln.10 to pg. 6, ln. 23; pg. 8, lns. 15-25).
After describing the restitution he agreed to pay by pleading guilty, the Court confirmed with

¹² This investigation involved his defrauding Washington Federal Savings and is the restitution imposed in Case No. CR-FE-2014-3478.

1 defense counsel that the Court's understating was "an accurate reflection of the plea agreement."
2 (Tr., pg. 8, lns. 1-3).

3 Moreover, the Court specifically inquired whether Leytham understood that he was
4 agreeing to pay restitution by pleading guilty.

5 Q. Now you understand that you're agreeing to pay restitution in all of these
6 cases including the dismissed cases. Do you understand that?

7 A. Yes, ma'am.

8 Q. And you're also agreeing to pay restitution in the case that's the DR case,
9 2014-411861. Do you understand that?

10 A. And which one would that be, ma'am?

11 Q. That's the one that — it's the one that they're not going to file on.

12 A. Yes.

13 (Tr., pg. 23, ln.15 to pg. 24, ln.1). The Court continued:

14 Q. And do you understand again about the requirement that you're going to
15 have to pay restitution to your victims?

16 A. Yes ma'am.

17 Q. And I noticed that you crossed yes and then it looks like over no it says --
18 you wrote L -- it looks like a signature but I'm not positive. It looks like an initial.
19 But do you understand that you have to pay restitution to the victims?

20 A. Yes, ma'am.

21 (Tr., pg. 27, lns. 7-17).

22 Restitution ultimately amounted to \$55,331.92 and \$202.75 in Leytham's cases. Leytham
23 clearly acknowledged that he understood that he was obligated to pay restitution, including on
24 DR#2014-411861, and that he was aware of the amount of restitution. He acknowledged this
25 responsibility multiple times directly to the Court and through his attorney. Furthermore, Leytham
26 agreed that he had access to discovery documents that indicated restitution would be significant in
his cases. The restitution amounts are in those discovery documents. The exact amount ultimately
agreed to, \$55,331.92, is in police reports, DR#2014-411861, which were provided to Leytham
and his counsel prior to the plea. Leytham testified he had reviewed the discovery prior to the plea.
Leytham's attorney stated as follows:

THE COURT: Is that -- is the amount of restitution, is that something he's going to
be agreeing to?

1 MR. NEVILLE: It is, Your Honor.

2 THE COURT: And do you believe there's a sufficient basis to impose those
3 amounts?

4 MR. NEVILLE: I do.

5 (Tr., pg. 36, lns. 8-14). As the State noted, the same police reports were also in the presentence
6 report which Leytham told the Court he had read.

7 There is no evidence to support his conclusory claim that he and his counsel did not discuss
8 the restitution amount, especially in the face of the record. Leytham's application must present or
9 be accompanied by admissible evidence supporting its allegations, or the application will be
10 subject to dismissal; there is no requirement that the court give evidentiary value to mere
11 conclusory allegations that are unsupported by admissible evidence. *Drapeau v. State*, 103 Idaho
12 612, 617, 651 P.2d 546, 551 (Ct.App.1982).

13 Under these circumstances we hold that, to justify an evidentiary hearing in a post-
14 conviction relief proceeding, it is incumbent upon the applicant to tender a factual
15 showing based upon evidence that would be admissible at the hearing. His
16 application must be supported by written statements from witnesses who are able to
17 give testimony themselves as to facts within their knowledge, or must be based
18 upon otherwise verifiable information. Absent the witnesses or verifiability of the
19 facts to which they could testify, we hold the application fails to raise material
20 issues of fact sufficient to justify an evidentiary hearing.

21 *Id.*

22 The Court dismisses this claim and finds it does not support post-conviction relief.

23 3. The Court dismisses Leytham's claim that trial counsel was ineffective by failing to
24 advise him about his *Estrada* rights.

25 Leytham claims that his trial counsel failed to advise him that he had a right to remain
26 silent during his presentence report investigation. However, this will not sustain post-conviction
relief because, even if true, the guilty plea advisory form he completed and the Court's colloquy
with him when it took his plea clearly establish that he was informed by the Court. They prove that
Leytham understood his right to remain silent during all the examinations before pleading guilty.

As discussed above, the Idaho Supreme Court recently addressed a similar *Estrada* claim
arising in a similar context. *Murray*, 156 Idaho 159, 168, 321 P.3d 709, 718.

There, the Court held, where the record establishes a defendant fully understood his
or her *Estrada* rights and voluntarily waived them; the defendant fails to establish
prejudice by demonstrating a substantial likelihood of a different result had the

attorney's representation not been deficient. *Id.* at 168, 321 P.3d at 718. The situation here is analogous to that in *Murray*. Grant was aware of his right not to participate in the evaluation and has failed to demonstrate how having his attorney additionally advise him of this right would have made any difference. Thus, Grant failed to allege the possibility of a valid claim. Therefore, the district court properly refused to appoint counsel on this claim.

Grant v. State, 329 P.3d 380, 387, 156 Idaho 598, 605 (Ct. App. 2014). Therefore, while a failure to inform him of his *Estrada* rights would fall below

The Court dismisses this claim and finds it does not support post-conviction relief because he cannot show he was prejudiced by the failure, if any. While such a failure would fall below an objective standard of reasonableness, Leytham cannot show that it prejudiced him because this Court unmistakably did advise him. *Murray*, 156 Idaho at 167-68, 321 P.3d at 717-18.

4. The Court dismisses Leytham's claim that trial counsel was ineffective for not reviewing his presentence report with him.

Leytham argues his attorney provided ineffective assistance by not reviewing the presentence investigation report with him. First, the record indicates that when asked by the Court during sentencing whether he had read the presentence report, Leytham said "yes, ma'am." (Tr., pg. 37, lns. 3-5). The Court later asks his attorney whether shared a copy of the I.C. § 19-2522 with Leytham and his attorney, Mr. Neville stated:

I have, Your Honor. And it think it's important I put on the record he was not able to read that just due to some health problems, so I actually read it to him.

(Tr., pg. 37, lns. 4-7). When asked whether there were corrections, again his counsel noted a correction to the 19-2522 evaluation, implying that Leytham brought that to his attention.

Second, like the defendant in *Jones v. State*, while he complains that his counsel was ineffective by failing to go over the presentence report with him, assuming that to be true, he fails to identify what errors or omissions, if any, he would want corrected or what information he would have introduced. He fails to explain how this alleged failure affected the outcome or the "resulting prejudice".

now that Jones has seen the report, he has failed to allege in his application for post-conviction relief what errors, if any, appear in the presentence investigation report and any resulting prejudice. Under the summary dismissal procedure as outlined by I.C. § 19-4906(c), the court may grant a summary dismissal if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Even assuming the facts alleged in Jones' affidavits are true, Jones

1 has failed to allege any errors or corrections he would have made at sentencing.
2 Because he has failed to indicate what errors were contained in the presentence
3 report that resulted in prejudice, Jones is not entitled to relief. Therefore, the state,
4 as a matter of law, is entitled to summary judgment. The district court did not err in
5 summarily dismissing the application for post-conviction relief on these g

6 *Jones v. State*, 870 P.2d 1, 3, 125 Idaho 294, 296 (Ct. App. 1994)

7 Like *Jones*, he is not entitled to post-conviction relief on this basis and the claim is
8 dismissed.

9 5. The Court dismisses Leytham's claim that trial counsel was ineffective by telling
10 him to remain silent at sentencing.

11 Leytham complains that his trial counsel was ineffective because he advised him to be
12 silent when the Court asked whether he wanted to make a statement. For the purposes of this post-
13 conviction, the Court assumes this to be true. (The Court notes that he also wrote a letter to the
14 Court which the Court considered and made part of the presentence report with the consent of
15 counsel.) This does not entitle him to post-conviction relief.

16 Advising a client not to speak during sentencing is a tactical decision. Leytham did not
17 show or even argue his counsel's choice of tactics was "was unsound or that it resulted from any
18 shortcomings in counsel's knowledge or preparation." *Buck v. State*, 124 Idaho 155, 160, 857 P.2d
19 634, 639 (Ct. App. 1993). Assuming it happened and that it was not a strategic decision not to be
20 second guessed on post-conviction, Leytham also introduced no evidence of what he would have
21 said that would have affected the outcome. In other words, he has not identified any prejudice.

22 The Court dismisses this claim.

23 6. The Court dismisses Leytham's claims related to an alleged breakdown of his
24 relationship with his trial counsel.

25 Leytham claims his relationship with his trial counsel broke down and as a result his
26 counsel was ineffective, making *Cronic* potentially applicable.

The Sixth Amendment does not guarantee a "meaningful relationship" between a client and
his attorney. *Morris v. Slappy*, 461 U.S. 1, 14 (1983). However, forcing a defendant to go to trial
with an attorney with whom he has an irreconcilable conflict amounts to constructive denial of the
Sixth Amendment right to counsel. *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970). An
irreconcilable conflict in violation of the Sixth Amendment occurs only where there is a complete
breakdown in communication between the attorney and client, and the breakdown prevents

1 effective assistance of counsel. *Schell v. Witek*, 218 F.3d 1017, 1026 (9th Cir. 2000).
2 Disagreements over strategic or tactical decisions do not rise to level of a complete breakdown in
3 communication. *Id.*

4 In this case, even assuming the relationship to have been strained, the record is clear that
5 there was not a complete breakdown of communication. Furthermore, Leytham failed to identify
6 what resulted from that alleged breakdown. Therefore, this claim fails.

7 **C. There is no evidence that his medications affected his ability to enter his plea.**

8 Like the defendant in *Workman*, while not explicitly argued, Leytham suggests that his plea
9 was involuntary because his medication. However, other than his bald assertion, Leytham does not
10 support his claim with any admissible evidence, especially in the face of the record. Leytham's
11 application must present or be accompanied by admissible evidence supporting its allegations, or
12 the application will be subject to dismissal; there is no requirement that the court give evidentiary
13 value to mere conclusory allegations that are unsupported by admissible evidence. *Drapeau*, 103
14 Idaho at 617, 651 P.2d at 551.

15 Under these circumstances we hold that, to justify an evidentiary hearing in a post-
16 conviction relief proceeding, it is incumbent upon the applicant to tender a factual
17 showing based upon evidence that would be admissible at the hearing. His
18 application must be supported by written statements from witnesses who are able to
19 give testimony themselves as to facts within their knowledge, or must be based
20 upon otherwise verifiable information. Absent the witnesses or verifiability of the
21 facts to which they could testify, we hold the application fails to raise material
22 issues of fact sufficient to justify an evidentiary hearing.

23 *Id.* The record also belies his assertions. This is the colloquy the Court had with Leytham while he
24 was under oath.

25 Q. Now, you've indicated that you've been taking a pill for depression as well
26 as some other medications and some Hydrocodone for your neck pain; is that
correct?

A. Yes, Your Honor.

Q. Are you having any difficulty understanding these proceedings?

A. No, ma'am.

Q. And you have been taking all of these medications for some time, about 45
days you said?

A. Just take depression for 45. The rest of them I've been taking since 2005.

1 Q. Okay. Normally by this time in any of these medications any effects have
2 stabilized. But I just want to make sure are you having any sleepiness or any
3 difficulty understanding what we're talking about here today?

4 A. No, Your Honor.

5 Q. And do you feel that these medications prevented you from knowingly and
6 voluntarily deciding to plead guilty?

7 A. No, Your Honor.

8 Q. Did they make you more susceptible to Mr. Blender's suggestions?

9 A. Yes, Your Honor.

10 Q. They did? So your -- Mr. Blender's suggestion -- these medications made
11 you more susceptible to those?

12 A. No, ma'am. I'm sorry. I misunderstood you.

13 Q. You misunderstood my question?

14 A. Yes, ma'am.

15 Q. Okay. And so these are your decisions, not Mr. Blender's decisions?

16 A. Yes, ma'am.

17 Q. And, again, just for the record, his answers seem appropriate to me, his
18 affect is appropriate. We've got great eye contact. He's not slurring his words. He
19 doesn't appear sleepy. His answers do not seem inappropriate to me. Is there
20 anyone here who would disagree with that?

21 MS. DUNN: No, Your Honor.

22 THE COURT: Mr. Blender?

23 MR. BLENDER: No, Your Honor. I agree with what he said.

24 THE COURT: Mr. Leytham?

25 **THE DEFENDANT: I agree with what you said, ma'am.**

26 THE COURT: Great.

Q. BY THE COURT: Now, a couple more questions. You're under the care of a
Dr. Fred Rice; is that right?

A. Yes, I am. He is one of my clients plus he's also a psychologist and I talk to
him once in a while.

Q. Well, who is prescribing the depression medication?

A. That would be my doctor, Dr. Fox, Michael Fox out of Kuna Advanced
Care.

Q. Okay. So you've been seeing these people for some time?

1 A. Yes, ma'am.

2 Q. What was the diagnosis that you got? You said you were diagnosed in 1979.
3 Tell me what that was.

4 A. I'm a schizophrenic and a split personality, ma'am.

5 Q. Okay. So what are you taking for schizophrenia?¹³

6 A. Nothing. I grew out of that within years.

7 Q. Okay. Is there anything else that you think might affect your ability to
8 understand the questions or make a decision in this case?

9 A. No, ma'am.

10 (Tr., pg. 19, ln.25 to pg. 22, ln.24) (emphasis added).

11 Leytham does not claim he was not competent to enter a guilty plea and, in fact, there is no
12 evidence he was not competent. The issue is whether Leytham knowingly, willingly, and
13 voluntarily entered a guilty plea.

14 For a guilty plea to be valid, the entire record must demonstrate that the plea was
15 entered into in a voluntary, knowing, and intelligent manner. *State v. Heredia*, 144
16 Idaho 95, 96, 156 P.3d 1193, 1194 (2007). Whether a plea is voluntary and
17 understood entails inquiry into three areas: (1) whether the defendant's plea was
18 voluntary in the sense that he understood the nature of the charges and was not
19 coerced; (2) whether the defendant knowingly and intelligently waived his rights to
20 a jury trial; and (3) whether the defendant understood the consequences of pleading
21 guilty. *State v. Colyer*, 98 Idaho 32, 34, 557 P.2d 626, 628 (1976).

22 *Workman v. State*, 144 Idaho 518, 527-28, 164 P.3d 798, 807-08 (2007). Like Workman, Leytham
23 suggests that his guilty plea was involuntary because, at the time he entered it, he was medicated.
24 However, the colloquy clearly establishes that Leytham had the mental capacity and understanding
25 and he aware that he was medicated but did not believe the drug affected his understanding of his
26 guilty plea.

In fact, the Court carefully put on the record its own observations and asked whether
anyone disagreed. Even Leytham agreed with the Court's observations.

Q. And, again, just for the record, his answers seem appropriate to me, his
affect is appropriate. We've got great eye contact. He's not slurring his words. He

¹³ The Court ordered an I.C. § 19-2522 evaluation and the psychologist diagnosed him with Dysthymic Disorder with a
provisional diagnosis of Generalized Anxiety Disorder. He also diagnosed him with a Personality Disorder and
Borderline Intellectual functioning. Nothing in the evaluation suggested he was not competent.

1 doesn't appear sleepy. His answers do not seem inappropriate to me. Is there
2 anyone here who would disagree with that?

3 (Emphasis added.) In fact, Leytham stated as follows:

4 **THE DEFENDANT: I agree with what you said, ma'am.**

5 (Emphasis added.)


6 Thus, is not a basis to grant him post-conviction relief and the Court denies his claim.

7 CONCLUSION

8 Having reviewed the Petition, and any evidence in a light most favorable to Leytham and
9 having considered the oral argument, the Court finds that it is satisfied that Leytham is not entitled
10 to post-conviction relief. I.C. §19-4906(2). The Court further finds there is no dispute of material
11 fact and no purpose would be served by any further proceedings. *Repp v. State*, 136 Idaho 262,
12 ___, 32 P.3d 156, 157-58 (Ct. App. 2001). Therefore, the Court hereby grants the State's motion
13 and dismisses Leytham's Petition.

14 **IT IS SO ORDERED.**

15 Dated this 28th day of August 2015.

16 
17 _____
18 Cheri C. Copsey, District Judge

1 The undersigned authority hereby certifies that on August 20th, 2015, I mailed (served) a
2 true and correct copy of the **ORDER GRANTING MOTION** as notice pursuant to Rule 77(d)
3 I.C.R. to each of the parties below as follows:

4 JAN M. BENNETTS
5 ADA COUNTY PROSECUTING ATTORNEY
6 SHAWNA DUNN
7 INTERDEPT. MAIL

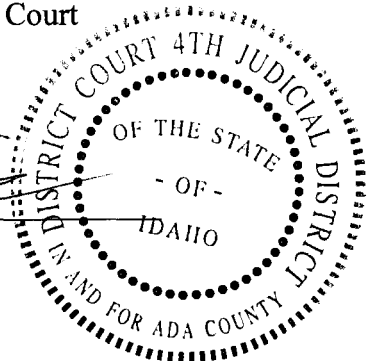
8 ADA COUNTY PUBLIC DEFENDERS OFFICE
9 LANCE FUISTING
10 INTERDEPT. MAIL

11 CHRISTOPHER D. RICH
12 Clerk of the District Court
13 Ada County, Idaho

14 Date: 8/28/15

15 By [Signature]

16 Deputy Clerk



AUG 28 2015

CHRISTOPHER D. RICH, Clerk
By KRISTI DUMON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY D. LEYTHAM,

Petitioner,

vs.

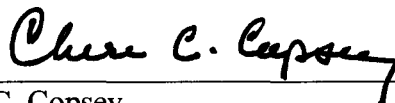
STATE OF IDAHO,

Respondent.

Case No. CV-PC-2015-2841

JUDGMENT**JUDGMENT IS ENTERED AS FOLLOWS:** the Petition is dismissed with prejudice.

Dated this 28th day of August 2015.

Cheri C. Copsey
District Judge**JUDGMENT**


1
2 CERTIFICATE OF MAILING
3

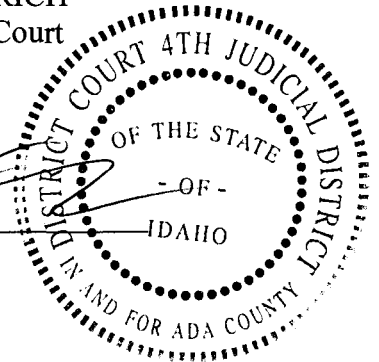
4 The undersigned certifies that on August 28th, 2015, I mailed one copy of the
5 **JUDGMENT** as notice pursuant to Rule 77(d) I.C.R. to each of the parties addressed as follows:

6
7 ADA COUNTY PROSECUTOR'S OFFICE
8 SHAWNA DUNN
9 INTERDEPARTMENTAL MAIL

10 ADA COUNTY PUBLIC DEFENDER'S OFFICE
11 LANCE FUISTING
12 INTERDEPARTMENTAL MAIL
13

14 CHRISTOPHER D. RICH
15 Clerk of the District Court
16 Ada County, Idaho

17
18 By 
19 Deputy Clerk



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31
32 **JUDGMENT**

NO. _____ FILED _____
A.M. _____ P.M. 240
SEP 08 2015
CHRISTOPHER D. RICH, Clerk
By TENILLE GRANT
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorneys for Petitioner-Appellant

LANCE L. FUISTING, ISB #7791
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY D. LEYTHAM,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent-Respondent.

Case No. CV-PC-2015-2841

NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENT, STATE OF IDAHO, AND THE CLERK
OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

- 1) The above-named Appellant appeals against the above-named respondent to the Idaho Supreme Court from the final decision and order entered against him in the above-entitled action on August 28, 2015, the Honorable Cher C. Copsey, District Judge presiding.
- 2) That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under, and pursuant to, IAR 11(a)(1-9).
- 3) A preliminary statement of the issues on appeal, which the Appellant then intends to assert in the appeal, provided any such list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal is:
 - a) Did the District Court err in granting summary dismissal of Mr. Leytham's Post Conviction claims?

NOTICE OF APPEAL

- 4) Reporter's Transcript. The Appellant requests the preparation of the entire reporter's standard transcript as defined by IAR 25(c). The Appellant also requests the preparation of the additional portions of the reporter's transcript:
 - a) Status Conference hearing held June 17, 2015 (Court Reporter: Maria Glodowski. Estimated pages: 50).
- 5) Clerk's Record. The Appellant requests the standard clerk's record pursuant to IAR 28(b)(1). In addition to those documents automatically included under IAR 28(b)(1), Appellant also requests that any briefs, statements or affidavits considered by the court, and memorandum opinions or decisions of the court be included in the Clerk's Record.
- 6) I certify:
 - a) That a copy of this Notice of Appeal has been served on the Court Reporter(s) mentioned in paragraph 5 above.
 - b) That the Appellant is exempt from paying the estimated fee for the preparation of the record because the Appellant is indigent. (I.C. §§ 31-3220, 31-3220A, IAR 24(e)).
 - c) That there is no appellate filing fee since this is an appeal in a criminal case (I.C. §§ 31-3220, 31-3220A, IAR 23(a)(10)).
 - d) Ada County will be responsible for paying for the reporter's transcript, as the client is indigent (I.C. §§ 31-3220, 31-3220A, IAR 24(e)).
 - e) That service has been made upon all parties required to be served pursuant to IAR 20.

DATED this 8th day of September 2015.



Lance L. Fuisting
Attorney for Petitioner

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 8 day of September 2015, I mailed (served) a true and correct copy of the within instrument to:

Idaho Attorney General
Criminal Division
Joe R. Williams Bldg., 4th Flr.
Statehouse Mail

Idaho Appellate Public Defender
3050 North Lake Harbor Lane, Suite 100
Boise, Idaho 83703

Maria Glodowski
Court Reporter
Interdepartmental Mail

Shawna Dunn
Ada County Prosecutor's Office
Interdepartmental Mail



Quincy K. Harris

RECEIVED
SEP 08 2015

Ada County Clerk
ADA COUNTY PUBLIC DEFENDER
Attorneys for Petitioner-Appellant

LANCE L. FUISTING, ISB #7791
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

NO. _____ FILED _____
A.M. _____ P.M. 1.39

SEP 10 2015

CHRISTOPHER D. RICH, Clerk
By BETH MASTERS
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY D. LEYTHAM,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent-Respondent.

Case No. CV-PC-2015-2841

ORDER APPOINTING STATE
APPELLATE PUBLIC DEFENDER ON
DIRECT APPEAL

Petitioner has elected to pursue a direct appeal in the above-entitled matter. Petitioner being indigent and having heretofore been represented by the Ada County Public Defender's office in the District Court, the Court finds that, under these circumstances, appointment of appellate counsel is justified. The Idaho State Appellate Public Defender shall be appointed to represent the above-named Petitioner in all matters pertaining to the direct appeal. *~*

SO ORDERED AND DATED this 10 day of September 2015.

Cher C. Copsey

Cher C. Copsey
District Judge

CERTIFICATE OF MAILING

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have mailed one copy of the Order Appointing State Appellate Public Defender on Direct Appeal as notice pursuant to the Idaho Rules to each of the parties of record in this case in envelopes addressed as follows:

Idaho Attorney General
Criminal Division
Joe R. Williams Bldg., 4th Flr.
Statehouse Mail

Idaho Appellate Public Defender
3050 North Lake Harbor Lane, Suite 100
Boise, Idaho 83703

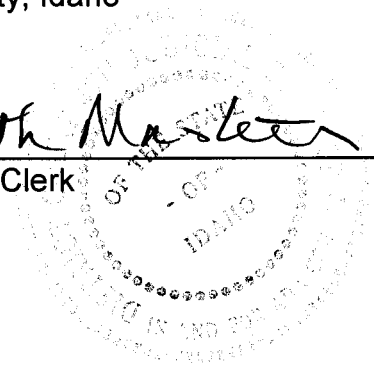
Shawna Dunn
Ada County Prosecutor's Office
Interdepartmental Mail

Ada County Public Defender
Attn: Jacob Precht
Interdepartmental Mail

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

Date: 9.10.15

By Beth Masten
Deputy Clerk



To: Stephen W. Kenyon - Sctfilings@idcourts.net

NO. _____
A.M. _____
FILED P.M. 1:15

OCT 28 2015
CHRISTOPHER D. RICH, Clerk
By KELLE WEGENER
DEPUTY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
PETITIONER-APPELLANT)
vs.) Docket No. 43551-2015
JIMMY D. LEYTHAM,)
RESPONDENT-RESPONDENT)
_____)

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on October 27, 2015,
pursuant to Court order, a transcript of the proceedings
before the Hon. Cheri C. Copsey, on June 17, 2015,
(8 pages in length) was lodged with the District Court
Clerk of Ada County in the Fourth Judicial District for
inclusion in the above-entitled appeal.


TERESA SALMAN
M&M COURT REPORTING

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY D. LEYTHAM,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

Supreme Court Case No. 43551

CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

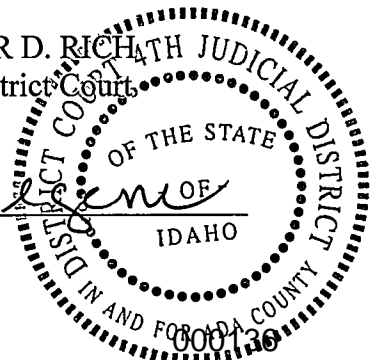
I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Transcript of proceedings held September 10, 2014 and December 31, 2014, Boise, Idaho, filed April 22, 2015

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 28th day of October, 2015.

CHRISTOPHER D. RICH
Clerk of the District Court

By KW [Signature]
Deputy Clerk



CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY D. LEYTHAM,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

Supreme Court Case No. 43551

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

STATE APPELLATE PUBLIC DEFENDER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WASDEN

ATTORNEY FOR RESPONDENT

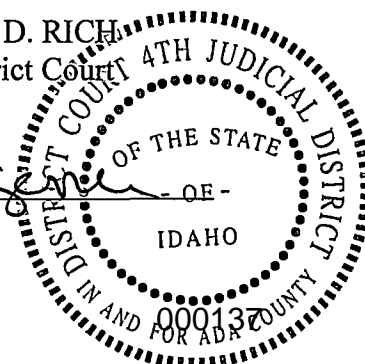
BOISE, IDAHO

Date of Service: OCT 28 2015

CERTIFICATE OF SERVICE

CHRISTOPHER D. RICH
Clerk of the District Court

By KWeseman
Deputy Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JIMMY D. LEYTHAM,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

Supreme Court Case No. 43551

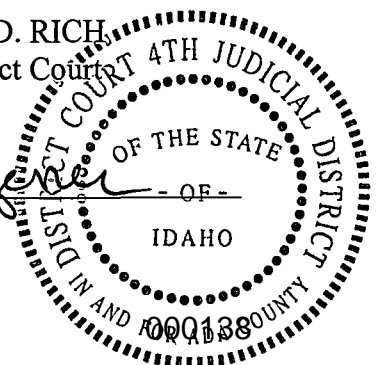
CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 8th day of September, 2015.

CHRISTOPHER D. RICH
Clerk of the District Court

By KWesger
Deputy Clerk



CERTIFICATE TO RECORD